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### Constitutionalization of Human Rights in Post-Soviet States and Latin America: A Comparative Analysis

Rett R. Ludwikowski

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# CONSTITUTIONALIZATION OF HUMAN RIGHTS IN POST-SOVIET STATES AND LATIN AMERICA: A COMPARATIVE ANALYSIS

Rett R. Ludwikowski\*

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## I. INTRODUCTION: COMPARING APPLES AND ORANGES? NOT EXACTLY

Experts studying the process of political transformations in Latin America and the post-Soviet states have observed that constitutional systems of the countries of both regions continue to change.<sup>1</sup> The wave of constitution-making,<sup>2</sup> which in the region of former Soviet dominance started in the 1990s<sup>3</sup> and in Latin America has intensified in the last several decades,<sup>4</sup> has by no means been completed. In the early twenty-first century, numerous constitutional amendments were adopted and some states superseded relatively young constitutions with new ones.<sup>5</sup>

<sup>1</sup> See generally Carlos Santiago Nino, *Transition to Democracy, Corporatism, and Presidentialism with Special Reference to Latin America*, in CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD 46 (Douglas Greenberg et al. eds., 1993); Council for the Consolidation of Democracy, *Constitutional Reform in Argentina*, in PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT 158 (Arend Lijphart ed., 1992); Paul E. Sigmund, *Latin America: Change or Continuity?*, 60 FOREIGN AFFAIRS 629 (1981); Rett R. Ludwowski, *Latin American Hybrid Constitutionalism: The United States Presidentialism in the Civil Law Melting Pot*, 21 B.U. INT'L L.J. 29 (2003) [hereinafter Ludwowski, *Hybrid Constitutionalism*]; 1 COMPARATIVE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (Gisbert H. Flanz & Rett R. Ludwowski eds., 2002).

<sup>2</sup> See Jon Elster, *Forces and Mechanisms in the Constitution-Making Process*, 45 DUKE L.J. 364, 368-73 (1995).

<sup>3</sup> *Id.* at 369; see also Rett R. Ludwowski, *Searching for a New Constitutional Model for East-Central Europe*, 17 SYRACUSE J. INT'L L. & COM. 91, 165 (1991).

<sup>4</sup> See, e.g., Donna Lee Van Cott, *Latin America: Constitutional Reform and Ethnic Right*, 53 PARLIAMENTARY AFFAIRS 41, 41 (2000).

<sup>5</sup> Donna Lee Van Cott wrote with regard to Latin American constitutionalism: "[T]he region's new constitutions have been as frequent as they have been meaningless. The average life span of Latin American constitutions is less than 20 years. More than 200 have been written in the 150 years since independence, with a fresh constitution typically accompanying each change of power." *Id.* The 1988 Constitution of Brazil may serve as an extreme example; at the beginning of 2002; it had been amended forty-four times. Gisbert H. Flanz, *Editor's Note to Brazil*, in 3 CONSTITUTIONS OF THE COUNTRIES OF THE WORLD iii, iii (Albert P. Blaustein & Gisbert H. Flanz eds., 2003) [hereinafter CONSTITUTIONS]. Besides the Constitution of Brazil, only two other constitutions were adopted in the 1980s: the 1982 constitutions of El Salvador and Honduras. All other constitutions in the continental countries of Latin America were either adopted or heavily amended in the 1990s.

Similarly, after the fall of communism, the region of former Soviet dominance became a major laboratory of constitutional works, and the constitution-making process did not end with the adoption of the new constitutions. By the early twenty-first century, several basic laws had already been amended. In 2003 alone, the constitutions of Azerbaijan, Georgia, and the Kyrgyz Republic were amended; in the case of the Georgian act, several times.

When several countries in the same region are engaged in the constitution-drafting process, they look to the experiences of other states which are transforming their own systems.<sup>6</sup> Constitutions do not develop in a political vacuum and countries borrow from each other particularly heavily during transitory periods.<sup>7</sup> While drafters draw upon the experiences of countries with similar histories, they also look to well-tested constitutional models and attempt to rebuild them in the context of their own geopolitical circumstances.

Designing basic laws from scratch is a formidable challenge for any constitutional drafter. Research shows, however, that borrowing concepts or even selecting the templates for further experiments might be a difficult task as well. Several factors have contributed to the constitutional engineers' problems. First, there are very few so-called models of governance which states in the process of transforming their constitutional systems may consider for adoption. The scope of constitutional research in the post-socialist states illustrates the problem well. The drafters in post-socialist states looked most often to the liberal traditions of the United States, United Kingdom, France, and Germany.<sup>8</sup> Similarly, if constitutional modeling "means searching for a structural design for prospective constitution-making, then . . . the . . . Latin American constitutions [arguably were originally] 'modeled' on the United States Constitution."<sup>9</sup> Nevertheless, recent transformations have brought the constitutional drafters in this region closer to French, German, or Spanish alternatives.<sup>10</sup>

Second, an awareness of the countries' traditions and cultural legacies contributes to a unique dual approach to borrowing. On the one hand, drafters

<sup>6</sup> See generally Lee Epstein & Jack Knight, *Constitutional Borrowing and Nonborrowing*, 1 INT'L J. CONST. L. 196 (2003) (presenting general arguments in favor and against constitutional borrowing).

<sup>7</sup> See, e.g., Imre Vörös, *Contextuality and Universality: Constitutional Borrowings on the Global Stage – The Hungarian View*, 1 U. PA. J. CONST. L. 651 (1999) (describing constitutional borrowing by Hungary during its transition from communism).

<sup>8</sup> Cheryl Saunders even shortened this list. She wrote, "At the end of the twentieth century, most constitutional systems are or were derivative in part, with the possible exceptions of the ancestor systems of the United Kingdom, the United States and France." Cheryl Saunders, *A Constitutional Culture in Tradition*, in CONSTITUTIONAL CULTURES 37 (Miroslaw Wyrzykowski ed., 2000). The most frequently examined systems were the presidential model, the parliamentary and parliamentary-cabinet model, the chancellor's model, and the semi-presidential model. See KONSTYTUCYJNE SYSTEMY RZĄDOW: MOZLIWOŚCI ADAPTACJI DO WARUNKÓW POLSKICH [Constitutional Systems of Government: The Chances for Adoption in the Polish Conditions] (Michał Domagała ed., 1997).

<sup>9</sup> Ludwikowski, *Hybrid Constitutionalism*, *supra* note 1, at 29.

<sup>10</sup> See *id.* at 53 n.133, 59-61.

of the new constitutions want to assimilate well-tested models; on the other hand, they listen to some scholars from the "model" countries who suggest looking to local traditions for guidance rather than to the constitutional histories of the United States or Europe, which reach back to the era of the Enlightenment.<sup>11</sup> Following these suggestions usually results in an entirely new approach to constitution-making and has the tendency to create hybrid models, which are an amalgam of many well-known systems.<sup>12</sup>

For example, constitutional engineers currently are reviewing the concept of judicial review of the constitutionality of the law.<sup>13</sup> However, very few classic models of judicial enforcement exist. Some of these models, such as the so-called American decentralized model, were rooted in the concept of constitutional supremacy and the principle of *stare decisis*;<sup>14</sup> others, such as the Austrian centralized model, were usually adopted in countries with civil law traditions.<sup>15</sup> Selecting one of these models for the new constitutions may result in a failure to meet local expectations;<sup>16</sup> on the other hand, blending the features of these models may not fit other components of the legal system and affect its ultimate coherence.<sup>17</sup>

Drafting a new bill of rights also brings more specific problems. Contemporary human rights movements have produced an expansive amount of

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<sup>11</sup> See Stanley N. Katz, *Constitutionalism in East Central Europe: Some Negative Lessons from the American Experience*, in COMPARATIVE CONSTITUTIONAL LAW 283, 283 (Vicki C. Jackson & Mark Tushnet eds., 1999).

<sup>12</sup> Rett R. Ludwowski, *Constitutional Culture of the New East-Central European Democracies*, in CONSTITUTIONAL CULTURES, *supra* note 8, at 55.

<sup>13</sup> See MAURO CAPPELETTI, JUDICIAL REVIEW IN THE CONTEMPORARY WORLD 57-65 (1971); Larry Cata Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WM. & MARY BILL RTS. J. 117 (2003); Aharon Barak, *The Role of a Supreme Court in a Democracy, and the Fight Against Terrorism*, 58 U. Miami L. Rev. 125 (2003).

<sup>14</sup> See CAPPELETTI, *supra* note 13.

<sup>15</sup> Rett R. Ludwowski, *Judicial Review in the Socialist Legal Systems: Current Developments*, 37 INT'L & COMP. L.Q. 89, 91-92 (1988) [hereinafter Ludwowski, *Judicial Review*]; RETT R. LUDWIKOWSKI, CONSTITUTION-MAKING IN THE REGION OF FORMER SOVIET DOMINANCE 193-218 (1996) [hereinafter LUDWIKOWSKI, CONSTITUTION-MAKING].

<sup>16</sup> For example, early enthusiasm in the post-Soviet region about the adoption of the French preventive model was dampened by critics who claimed that review of the bill before promulgation interfered with the legislative process. Rett R. Ludwowski, "Mixed" Constitutions – Product of an East-Central European Constitutional Melting Pot, 16 B.U. INT'L L.J. 1, 52-53, 59-63 tbl.9 (1998).

<sup>17</sup> See Seth F. Kreimer, *Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing*, 1 U. PA. J. CONST. L. 640 (1999).

literature presenting international concepts of human rights protection.<sup>18</sup> However, these venerated standards are neither universally welcomed nor automatically recognized as superior.

Legal literature does not provide a satisfactory explanation of the reasons for the unequal protection of rights in different ethnic regions. Constitutional experts studying this problem have realized that human rights attitudes are deeply rooted in the legal and political cultures of national and ethnic groups and cannot be explained without an examination of the historic factors that contribute to the patterns and paradigms for human rights protection in a given culture.<sup>19</sup> Without an examination of all these factors, it is difficult to decide to what extent the universally accepted standards might be adaptable and enforceable in specific national and regional circumstances.

Even without an exhaustive analysis of the methodology of constitution-making, however, the comments above warrant two conclusions. First, constitutional drafters do not just borrow models or concepts; they look for remedies to common problems. Thus, comparing constitutions does not only mean the exposition of similarities and differences, but also the opportunity for some countries to learn from the experiences of others. Second, regardless of the inherent complications related to constitutional borrowing, the process guarantees the discovery of enough common constitutional features to make the comparison of constitutions, even those produced in distant regions, at least justifiable.

This reflection has guided this Article's development. The project builds on several books and numerous articles already published by the author on the political transformation of the Eastern and Central European and Latin American states.<sup>20</sup> This Article, however, goes beyond the main topic of the prior studies, namely, the development of political structures in transitional democracies, and focuses on the constitutionalization of human rights. It also covers a different region of former Soviet dominance. Although it refers to general experiences of post-socialist countries, its main objective is to compare the constitutional protections of human rights in the states of Latin America and the former Soviet Union which, at some period in their history, developed presidential or semi-presidential systems.

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<sup>18</sup> Gisbert H. Flanz, *Preface to Comparative Human Rights and Fundamental Freedoms* of 1 COMPARATIVE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *supra* note 1, at xi, xi-xiii.

<sup>19</sup> *See id.* at xi-xii.

<sup>20</sup> This Article utilizes, in particular, observations produced by two studies: Ludwikowski, *supra* note 16, and Ludwikowski, *Hybrid Constitutionalism*, *supra* note 1.

This Article analyzes the process of drafting bills of rights in a broad context, going beyond the examination of traditional lists of rights. It assumes that most normative constitutional provisions can be translated into the rights of the people and duties of governmental organs. For this reason, it also analyzes the systems of governance, relations between the powers, and mechanisms of judicial enforcement of rights and freedoms.

This Article consists of four parts. The first, which is more general, addresses the question to what extent the system of governance adopted by the countries of both regions affected the record of the states' protection of human rights. For instance, this Article considers whether democratization of the political system necessarily results in better protection of human rights. The second part analyzes the placement of human rights in the framework of the Latin American and post-Soviet constitutions. The third part identifies and discusses the problem of individual and group rights, an issue crucial for both regions. The fourth part provides a comparative analysis of the main categories of constitutionalized rights and freedoms. Although this part examines the general approach of the constitutional drafters to social, economic, and cultural rights, it focuses on so-called first category rights, such as personal freedoms and civil and political rights, as well as on enforcement mechanisms. The conclusion will supply observations on the most important lessons that constitutional drafters can learn from the experiences of others.

## II. PRESIDENTIAL SYSTEM OF GOVERNANCE AND CONSTITUTIONALIZATION OF RIGHTS AND FREEDOMS

Even a superficial search for similarities in the systems of governance of the Latin American and post-Soviet states reveals an inclination to borrow from the U.S. presidential system. The main features of U.S. presidentialism are apparent in the constitutional systems of many countries of both regions;<sup>21</sup> the components of the U.S. system, however, have not been duplicated. The Latin American and post-Soviet presidential systems, which both have roots in U.S. traditions, are in many ways different from the U.S. prototype. As this Article will argue, the differences have consequences for the constitutional protection of human rights.

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<sup>21</sup> Robert S. Barker, *Constitutionalism in the Americas: A Bicentennial Perspective*, 49 U. PITT. L. REV. 891, 899 (1988).



*A. U.S. Presidentialism and the European Doctrine of Division of Powers*

From its conception, the U.S. version of the doctrine of division of powers differed from its European prototypes. The concept of presidential power in the United States was deeply rooted in the American system of checks and balances, which differed from the classical European doctrine of division of power. For European philosophers John Locke and Baron de Montesquieu, the main rationale for the distribution of power was the protection of society from an absolute, arbitrary authority<sup>22</sup>—the powers did not need to be equal or even separate. Locke listed three powers in the British Commonwealth: legislative, executive, and federative; however, he suggested that supreme power lay in the legislature and did not recognize the judiciary as a separate power.<sup>23</sup> Montesquieu enumerated the judiciary among the powers, but as Mauro Cappelletti convincingly argued, Montesquieu believed that the judiciary, in fact, was “no power at all.”<sup>24</sup> Montesquieu wrote, “Of the three powers of which we have spoken, the judicial is, in a sense, null.”<sup>25</sup>

The forefathers of the U.S. model shared the European concept of a government whose authority was limited through its diffusion among several organs.<sup>26</sup> For both the Europeans and Americans, limited government guaranteed individual freedom, however, the two groups differed regarding the scope of protection of other fundamental values, such as equality, religious liberty and toleration, and property.<sup>27</sup>

The American model did not strictly require equality of powers, but it could not accept the supremacy of one power over the others. It emphasized the

<sup>22</sup> John Locke wrote, “Absolute arbitrary power, or governing without *settled standing* laws, can neither of them consist with the ends of society and government.” JOHN LOCKE, TWO TREATISES OF GOVERNMENT, in CLASSICS OF MORAL AND POLITICAL THEORY 661 (Michael L. Morgan ed., 3d ed. 2001).

<sup>23</sup> See Scott Fairley, John Locke’s Two Treatises of Government and the American Founders’ Separation of Powers (1995) (unpublished M.A. thesis, University of Guelph) (offering a more detailed examination of Locke’s theory of separation of powers).

<sup>24</sup> See Mauro Cappelletti, *Repudiating Montesquieu? The Expansion and Legitimacy of Constitutional Justice*, 35 CATH. UNIV. L. REV. 1, 12-14 (1985).

<sup>25</sup> *Id.* at 13-14 (translating CHARLES DE SECONDAT, BARON DE MONTESQUIEU, DE L’ESPRIT DES LOIS bk. XI, ch. VI (Garnier Frères 1973) (1748)).

<sup>26</sup> See Ludwikowski, *supra* note 16, at 7.

<sup>27</sup> See, e.g., Rett R. Ludwikowski, *The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions*, 11 MICH. J. INT’LL. 167, 192-96 (1989) (describing American and European concepts of the protection of “sacred and imprescriptible rights”).

powers' "equilibrium," a "sharing" of functions, and a "hampering" of one power by another.<sup>28</sup> The threat of arbitrariness was less real in American geopolitical circumstances than in Europe. Thus, the main goal of the distribution of powers in the United States was to improve the stability of the government and guarantee that the divided authorities would not violate the rights and freedoms of individuals.

### *B. Transformations of Latin American Presidentialism*

Although the intention of the Latin American states to borrow from the U.S. presidential model has been well documented,<sup>29</sup> they were also quite aware of their European legacies.<sup>30</sup> This is one of the reasons that the constitution-making process in this region did not produce many states that could be classified as purely presidential republics.<sup>31</sup> The fact that the provisions of several Latin American constitutions, particularly the language of the preambles, clearly resemble the U.S. Constitution often obliterated the evidence that the Latin American countries, from the early stages of the constitution-making process, adopted the U.S. prototype with numerous modifications.

Although many features of the presidential system, such as the concept of checks and balances, the personal incompatibility of the executive and legislative positions, the presidential right to veto legislative actions, and direct presidential elections, have been incorporated into many parliamentary or hybrid presidential-parliamentary systems, several traditional attributes of the presidential model remain almost intact.<sup>32</sup> These attributes are the concentration of the functions of a head of state and head of government in the position of the president, the lack of political responsibility of the members of cabinet before the parliament, and the lack of a presidential or executive prerogative

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<sup>28</sup> See, e.g., RICHARD E. NEUSTADT, *PRESIDENTIAL POWER: THE POLITICS OF LEADERSHIP* 33-57 (1960) (explaining that presidential power is limited because it is shared).

<sup>29</sup> See ALLAN R. BREWER-CARÍAS, *JUDICIAL REVIEW IN COMPARATIVE LAW* 156 (1989).

<sup>30</sup> See, e.g., David S. Clark, *Judicial Protection of the Constitution in Latin America*, 2 *HASTINGS CONST. L.Q.* 405, 406-13 (1975) (examining the spread of Iberian law to Latin America).

<sup>31</sup> AREND LIPHART, *DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES* 38 (1984); see also GIOVANNI SARTORI, *COMPARATIVE CONSTITUTIONAL ENGINEERING: AN INQUIRY INTO STRUCTURES, INCENTIVES AND OUTCOMES* 83-86 (1994).

<sup>32</sup> See Ludwikowski, *Hybrid Constitutionalism*, *supra* note 1, at 37-38 (discussing the absorption of the attributes of the presidential system into hybrid models of governance).

of dissolution of the legislature. The adherence of a constitution to these classic features of the U.S. system has always been a litmus test of the drafters' readiness to adopt the presidential model in its relatively pure form.

Latin American constitutionalism thus clearly reveals its ambivalent character. On the one hand, Latin American elites, separated from the indigenous communities, peasants, and racial and religious minorities, viewed strong presidents as protectors of their social position.<sup>33</sup> On the other hand, the elites understood that the transfer of the Latin American social *caudillismo* to the political arena might help transform a presidential system into a dictatorship.<sup>34</sup> In contrast to the situation in the United States, the Iberian political leaders were not prepared to make the sacrifices necessary for the democratization of their ethnically diversified societies; rather, they were determined to curb the political power of the president by taking away certain discretionary powers or adding prerogatives more typical of the parliamentary than presidential system of governance.<sup>35</sup>

Although the Latin American deviations from U.S. presidentialism cannot explain all of the political and social hardships of the region, they have contributed to the alternation between insecure presidencies which are unable to resolve the social problems of highly polarized societies and dictatorships

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<sup>33</sup> Jacques Lambert links the process of the development of the presidential system in Latin America with the isolation of the small communities under tutelage of the landowners. He claims, however, that the adoption of the system "stemmed far more from the backwardness of the social structure, and insufficient integration" than from the clear intention of the Iberian elites to control the entire population. JACQUES LAMBERT, *LATIN AMERICA: SOCIAL STRUCTURE AND POLITICAL INSTITUTIONS* (Helen Katel trans., 1967), reprinted in JOHN HENRY MERRYMAN & DAVID S. CLARK, *COMPARATIVE LAW: WESTERN EUROPEAN AND LATIN AMERICAN LEGAL SYSTEMS* 334-35 (1978). He wrote:

The extreme de facto inequality in the largest part of Latin America does not stem from the deliberate intention of those who govern to subjugate people. Rather it derives from the governments' helplessness to eliminate archaic structures with sufficient speed, to administer the entire country effectively, and to raise standards of living and education.

*Id.*

<sup>34</sup> *Id.*

<sup>35</sup> To provide a few examples, some constitutions, even those adopted in the early stages of political development in the Latin American countries, required the ministers' endorsement for presidential actions. See, e.g., ARG. CONST. of 1853, art. 87. This provision of Argentina's 1853 Constitution has remained substantively intact in subsequent constitutions. See, e.g., ARG. CONST. art. 100. Other constitutions added the position of chief of the cabinet of ministers, subject to censorship and removal by the parliament. See, e.g., *id.* Still other constitutions vested in the president the right to dissolve the legislature. See, e.g., CONSTITUCION POLITICA DE PERU art. 157.

which attempt to introduce social order at the cost of violating fundamental human rights.<sup>36</sup> Latin American experiences with weak or excessively powerful presidencies resulted in such experiments as no re-election schemes for presidents, the elimination of corporatism or praetorianism, and quasi-presidential or quasi-parliamentary models.<sup>37</sup> Latin American countries tried to incorporate into their systems some elements of mixed models of governance, claiming that U.S. presidentialism is inherently less democratic.<sup>38</sup>

With regard to human rights protection, the exhaustion of many political remedies has produced social movements calling for the transformation of Latin American constitutions into multicultural laws which protect each person's rights and support the involvement of indigenous groups and ethnic and religious minorities in common social activities.<sup>39</sup> Donna Lee Van Cott, Assistant Professor of Political Science and Latin American Studies at Tulane University, wrote:

The political conjuncture presented by public debates on constitutional reform in the 1990s provided the perfect philosophical and practical context for indigenous peoples to put forward their claims. Constitution-making is a symbolic act in which the people (or peoples) give their consent to the institutions and values that define the terms of their self-government. Prior to the recent constitutional debates in which they took part, indigenous people were excluded from the process of constituting

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<sup>36</sup> See, e.g., AMNESTY INT'L, *TRANSITION AT THE CROSSROADS: HUMAN RIGHTS VIOLATIONS UNDER PINOCHET RULE REMAIN THE CRUX* (1996) (describing human rights violations and the military restrictions imposed in Chile by the Pinochet regime), at <http://web.amnesty.org/library/Index/engAMR220011996>; EDWARD L. CLEARY, *THE STRUGGLE FOR HUMAN RIGHTS IN LATIN AMERICA* (1997) (offering a more general study of human rights protection in Latin America).

<sup>37</sup> See Nino, *supra* note 1.

<sup>38</sup> Juan J. Linz wrote, "A careful comparison of parliamentarism as such with presidentialism as such leads to the conclusion that, on balance, the former is more conducive to stable democracy than the latter." Juan J. Linz, *The Perils of Presidentialism*, in *PARLIAMENTARY VERSUS PRESIDENTIAL GOVERNMENT*, *supra* note 1, at 119. Linz emphasized, "This conclusion applies especially to nations with deep political cleavages and numerous political parties; for such countries, parliamentarism generally offers a better hope of preserving democracy." *Id.*; see also Nino, *supra* note 1, at 60.

<sup>39</sup> Van Cott, *supra* note 4, at 41. See generally DONNA LEE VAN COTT, *THE FRIENDLY LIQUIDATION OF THE PAST: THE POLITICS OF DIVERSITY IN LATIN AMERICA* (2000) [hereinafter *FRIENDLY LIQUIDATION*]. But see Kirsten Matoy Carlson, Notice, *Premature Predictions of Multiculturalism?*, 100 MICH. L. REV. 1470 (2002).

the states of Latin America. They now have opportunity to participate autonomously.<sup>40</sup>

Although Van Cott may have prematurely heralded the success of the new multicultural constitutionalism, Latin Americans' awareness of their social and ethnic problems is unquestionably growing. Paradoxically, the constitutionalism of Latin America, despite incorporating European constitutional components, came closer to at least theoretical recognition of the traditional priorities of U.S. presidentialism, such as the concept of limited government, a democratically organized society, and human rights.

### *C. Presidential System of Governance in the Post-Soviet States*

Which of the two major systems of government, the presidential or parliamentary, will prevail in the republics of the former Soviet bloc? This question became a *leitmotiv* of the early stages of constitution-making in the region of former Soviet dominance. For commentators, it was unclear whether the inexperienced drafters would attempt to experiment with models which blended components of several major political systems. Many experts anticipated that, tired with the rules of communist strongmen, the new states would opt for the well-tested parliamentary systems of government.<sup>41</sup> After more than a decade of experimental constitutional drafting, most commentators admit that these early expectations proved incorrect.<sup>42</sup> The drafters of the new post-socialist constitutions did not hesitate to experiment with classical presidential and parliamentary systems,<sup>43</sup> but also produced mixed semi-presidential and semi-parliamentary models which borrowed from both Western and socialist traditions.<sup>44</sup> Several examples illustrate this point.

The first constitutional drafts of the Slavic republics of the former Soviet Union (Belarus, Russia, Ukraine) clearly borrowed from the American presidential system. The Presidential Draft Constitution of Russia reserved for

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<sup>40</sup> Van Cott, *supra* note 4, at 41.

<sup>41</sup> Ludwikowski, *supra* note 16, at 2.

<sup>42</sup> See Frederick Starr, *The Investment Climate in Central Asia and the Caucasus* (commenting on inherited pathologies of the region), [http://www.cacianalyst.org/Publications/Starr\\_invest.htm](http://www.cacianalyst.org/Publications/Starr_invest.htm).

<sup>43</sup> With the exception of the Baltic states, presidentialism arguably prevailed in most of the former Soviet republics. The former satellite republics of East-Central Europe opted for the parliamentary system; some states of the region clearly mixed both systems.

<sup>44</sup> Ludwikowski, *supra* note 16, at 1.

the president the right to control the executive; to veto any law enacted by the parliament, subject to the blocking vote of a two-thirds parliamentary majority; and to be elected in nationwide elections in tandem with a vice-president who would automatically become speaker of the parliament's upper chamber.<sup>45</sup> The final text of the 1993 Russian Constitution departed from the pure U.S. model, however, and combined French and American features. The Russian president has the power to initiate legislation,<sup>46</sup> which the French Constitution vests in the prime minister and members of parliament.<sup>47</sup> The Russian Constitution reserves for the president the power to veto legislative acts,<sup>48</sup> while the French president may only ask for a reconsideration of the law.<sup>49</sup> In Russia, the president also has the right to dissolve the parliament,<sup>50</sup> a right which has not been vested in his American counterpart. In contrast to the American president, the Russian president is the head of state but is not simultaneously head of government; however, his power to control the executive is stronger than that of the French president. The presidential appointments of the Russian prime minister require the consent of the state Duma, but the president has the power to call for the resignation of the whole government.<sup>51</sup> The French president does not have the discretion to terminate the functions of the prime minister since this requires the prime minister's resignation, which is obligatory only when the parliament has successfully censured the government or failed to approve its program.<sup>52</sup> In contrast, if the Russian state Duma adopts a no-confidence resolution, the president may approve it or dissolve the Duma after a second vote of no-confidence.<sup>53</sup>

Also borrowing from the American system, the early Ukrainian constitutional drafts declared that the president was both head of state and head of government—the prime minister was only a deputy “subordinated and

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<sup>45</sup> See *Presidential Draft Constitution of Russia Discovered*, SOVIET PRESS DIGEST, Apr. 9, 1992; see also *The President's Draft Constitution of Russia is Found* (official Kremlin international news broadcast, Apr. 9, 1992).

<sup>46</sup> RUSS. CONST. art. 84, § d.

<sup>47</sup> FR. CONST. art. 39.

<sup>48</sup> RUSS. CONST. art. 107.

<sup>49</sup> FR. CONST. art. 10.

<sup>50</sup> See RUSS. CONST. arts. 109, 111, 117. The French president may dissolve the national assembly but he must consult with the premier and the presidents of the chambers of parliament. FR. CONST. art. 12.

<sup>51</sup> RUSS. CONST. art. 83.

<sup>52</sup> FR. CONST. arts. 8, 50.

<sup>53</sup> RUSS. CONST. art. 117.

accountable" to the president.<sup>54</sup> The executive and legislative branches were separate and independent.<sup>55</sup> With the exception of the failure of an all-Ukrainian referendum to terminate the tenure of the head of state, the president could not dissolve the assembly.<sup>56</sup> The 1996 Constitution made concessions toward the parliamentary system. Similar to Latin American constitutions, it provided for dual executive power and ministerial counter-signature on some presidential decrees.<sup>57</sup> However, the presidential power to annul acts of ministers was retained with some limitations.<sup>58</sup>

The constitutional changes in Belarus also departed from the American presidential model, but they clearly transferred more power to the president of the republic. The Belarus Constitution, amended by the referendum of November 24, 1996,<sup>59</sup> gave the president the right to dissolve the legislative chamber and the right to initiate and veto legislation.<sup>60</sup> The president is also allowed to issue decrees and regulations binding on the territory of the whole country, which do not require any governmental counter-signature.<sup>61</sup> The president is the head of state and government; he appoints and recalls ministers and only his nomination of the prime minister has to be approved by the parliament.<sup>62</sup>

The evolution of the constitutional system in Moldova brought the country closer to the parliamentary system than its post-communist neighbors. However, even in Moldova, the process was hampered by attempts by the president and parliament to roll back some democratic freedoms.<sup>63</sup> Blending

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<sup>54</sup> See LUDWIKOWSKI, CONSTITUTION-MAKING, *supra* note 15, at 89-93; see also Ludwowski, *supra* note 16, at 38-41.

<sup>55</sup> See LUDWIKOWSKI, CONSTITUTION-MAKING, *supra* note 15, at 89-93.

<sup>56</sup> *Id.* at 91.

<sup>57</sup> See UKR. CONST. art. 106, § 31.

<sup>58</sup> See *id.* arts. 75, 106.

<sup>59</sup> Gisbert H. Flanz, *Introductory & Comparative Notes to Belarus*, in 2 CONSTITUTIONS, *supra* note 5, at vii, vii. The original Constitution of the Republic of Belarus was adopted on March 15, 1994, and amended according to Alexander Lukashenko's draft at the end of 1996. *Id.* The text of the original Belarus Constitution of 1994 is reprinted in LUDWIKOWSKI, CONSTITUTION-MAKING, *supra* note 15, at 332-50.

<sup>60</sup> BELR. CONST. arts. 93, 99, 100.

<sup>61</sup> *Id.* art. 85.

<sup>62</sup> *Id.* arts. 79, 84, 106.

<sup>63</sup> For several years following the adoption of the Constitution, the political system of Moldova looked unstable. Mircea Snegur and Petru Lucinschi, former presidents, were both in favor of changing the Constitution through a referendum and turning the country into a presidential republic. See International Foundation for Election Systems (Dec. 4, 2000), available at <http://www.ifes.md/cdpd/commentaris/20001204.html>; see also Basic Facts of

the features of the parliamentary and presidential systems resulted in the creation of an unstable set of checks and balances. The Constitution prohibits members of the government and deputies from holding other remunerated positions,<sup>64</sup> which means that in practice joint legislative and executive appointments are prohibited. On the one hand, the fact that the ministers do not sit in the parliament limits the executive's control of the legislative process. On the other hand, the Constitution still leaves the president with the right of legislative initiative, the right to request a reconsideration of the law, and the right to dissolve the parliament.<sup>65</sup> These rights hamper the activity of the legislature without leaving the government enough authority to balance the relations between the parliament and the president. In addition, the right of the parliament to suspend the president and initiate the process of removal of the head of state without implementing the regular impeachment procedure further destabilizes the system.<sup>66</sup>

In the states of the South Caucasus and Central Asia, the initial predilection for the presidential model of governance was clear, but in contrast to Moldova, the incorporation of the features of the parliamentary system only strengthened the president's power. For example, the heads of state in Kazakhstan and Kyrgyzstan initially did not have power to dissolve the parliament,<sup>67</sup> but this prerogative has been making inroads in almost all countries of the so-called southern cluster of the non-Slavic republics of the former Soviet Union. In all of the countries of this region, with the exception of Azerbaijan, Georgia, and Tajikistan, the presidents may dissolve the legislative body.<sup>68</sup> The presidents control the government and, through an extensive appointment authority, the judiciary as well. In some extreme cases, the presidents even attempted to

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Moldova, at <http://www.europeanforum.bot-consult.se/cup/moldova/facts.htm> (last modified Feb. 19, 1997). Contrary to their intentions, the historic referendum of July 5, 2000, decided the modification of the Constitution but with an entirely different result. It replaced direct presidential elections by secret vote in the parliament. The new Law on the Procedure of Electing the President of the Republic of Moldova of September 22, 2000, was returned to the Parliament by President Lucinschi for reconsideration and was not signed until October 27, 2000, when the Parliament, in the second vote, confirmed that the law is in accordance with constitutional reform. International Foundation for Election Systems, available at <http://www.ifes.md/news/0001> (June 29, 2001).

<sup>64</sup> MOLD. CONST. arts. 70, 99, § 1.

<sup>65</sup> *Id.* arts. 73, 85, 93, § 2.

<sup>66</sup> *Id.* art. 89, translated in 12 CONSTITUTIONS, *supra* note 5 (allowing for removal by two-thirds vote for "grave offenses infringing upon constitutional provisions").

<sup>67</sup> See the charts in Ludwikowski, *supra* note 16, at 46-47.

<sup>68</sup> See, e.g., ARM. CONST. art. 55, § 3; KAZ. CONST. art. 63, § 11; TURKM. CONST. art. 64.



constitutionalize the right to execute legislative mandates.<sup>69</sup> In most of the countries, referenda extended presidential terms from five to seven years, and by allowing more than two consecutive terms, practically secured lifetime presidencies for almost all incumbents.<sup>70</sup> These arrangements formally brought the concept of the presidential system dangerously close to authoritarian rule.

#### *D. System of Governance and Human Rights Protection*

The poor human rights record of Latin American and post-Soviet states has been well documented by governmental and non-governmental organizations.<sup>71</sup> Some questions, however, remain. To what extent is the problem related to common legacies and objective obstacles faced by both regions in the process of democratization and creation of the rule of law? To what degree has the

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<sup>69</sup> For example, in Kazakhstan, the senate is formed by indirect election by a joint session of the deputies of all local representative bodies (*Maslikhats*). KAZ. CONST. art. 51, §§ 2-5. It consists of two representatives from the capital and provinces (*oblasts*) and seven appointed by the president. KAZ. CONST. art. 50, § 2.

<sup>70</sup> In Kazakhstan, the 1998 constitutional amendments eliminated the sixty-five-year age limit on presidential candidates, increased the term from five to seven years, and removed the fifty percent minimum participation barrier for election. See KAZ. CONST. art. 41, § 1 (amended 1998). In Central Asia, Kyrgyzstan is an exception: the 2003 constitutional amendments provided that the president may be elected for five years and serve two consecutive years; the age limit of candidates is thirty-five to sixty-five years. KYRG. CONST. art. 43, § 3. The Tajikistan Constitution, amended in 2003, allowed the president to serve two consecutive seven-year terms; the amendments removed the sixty-five-year age limit. TAJ. CONST. art. 65 (amended 2003). In Turkmenistan, the five-year term of President Niyazov was extended by the national referendum in 1994 and the People's Council for an infinite period in December 1999. BUREAU OF DEMOCRACY, U.S. STATE DEP'T, HUMAN RIGHTS & LABOR, *Turkmenistan*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2001 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8359.htm>. The Uzbekistan Constitution allowed the president to serve two five-year terms. The 2002 referendum amended the Constitution to allow for seven-year presidential terms. Human Rights Watch, *Uzbekistan: President Rigs Extended Term of Office* (Jan. 26, 2002), available at <http://www.muslimuzbekistan.com/eng/ennews/2002/01/ennews26012002.html>. There are also speculations that, after the second presidential election in Russia in 2004, the supporters of President Putin may collect more than 300 of 450 votes, enough to amend the Constitution to allow for a third presidential term. *Familiar Candidates Skipping Russian Presidential Race*, WASH. POST, Dec. 31, 2003, at A13.

<sup>71</sup> See generally CLEARY, *supra* note 36; Rett R. Ludwowski, *Fundamental Constitutional Rights in the New Constitutions of Eastern and Central Europe*, 3 CARDOZO J. INT'L & COMP. L. 73 (1995).

selection of the presidential or mixed model over the parliamentary system hampered the development of adequate human rights protections?

U.S. presidentialism in Latin America has been tested under unique ethnic circumstances and cultural traditions.<sup>72</sup> While the relatively ethnically homogenous settlers in North America primarily followed English parliamentary and democratic traditions, the political culture of the Iberian colonists was more elitist and they were less disposed to animate politically passive groups of society. Latin American societies were more ethnically diverse than North American societies, and their leaders were more inclined to seek efficient measures to control indigenous groups, religious minorities, and peasants, than to accept the hardships which often accompany the process of democratization. While North Americans wanted to limit presidential power by balancing it with the other branches of government, Latin Americans wanted to blend presidentialism with other systems of government. Adopting civil law foundations, Latin American leaders were predisposed to experiment with continental European mixed systems of governance. Mixed systems were supposed to create strong executive branches without forming a dictatorship. In other words, the power in Latin America was divided but the powers, in contrast with the United States, were not equal or even well balanced.

Objective hardships also hampered the development of effective instruments of human rights protection in the post-Soviet states. All of the new republics experienced some communist traumas. Paradoxically, however, certain human rights-related problems surfaced after the fall of communism. The problems stemmed from several factors. First, the post-socialist republics inherited numerous regional problems with ethnic minorities, which traditionally worked against the healthy tendency to produce self-governing societies. The ethnic conflicts had been suppressed by communist totalitarian policies but were revived in the atmosphere of free dialogue and democratic transformations. Second, the communist legacy, which had an enduring impact on the social culture, hampered the democratization of post-socialist communities. A fundamental premise of the concept of civic society is the reconciliation of individual and social interests. Civic-mindedness cannot, however, flourish in an atmosphere of cynicism and distrust in common social values, which has been typical for socialist societies. Third, the development of a mature civic culture, characterized by respect for equal rights and freedoms of individuals and ethnic groups, requires time. The citizenries of the new democracies quickly learned to speak freely and openly; however, they could hardly digest

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<sup>72</sup> See Ludwikowski, *Hybrid Constitutionalism*, *supra* note 1, at 49-54.

the lesson that freedom of speech requires dialogue and the ability to listen to others' arguments. Characteristically, high levels of public emotions, often accompanied by ordinary public political passivity, hampered the development of a mature political and legal culture.

Communist jurisprudence has also never recognized the significance of separation of powers or checks and balances. Although socialist law theorists claimed that government legislative departments should be recognized as the supreme organs of power,<sup>73</sup> in fact, these organs followed recommendations of the Communist Party, the leading force of socialist society. The supremacy of the parliament thus always had a window-dressing character; the real supreme power was reserved for a very narrow group of party elites.

Most of the new leaders of the post-Soviet states inherited this philosophy along with their communist background. They tried to artificially marry the idea of checks and balances with the principle of supremacy of parliament.<sup>74</sup> The attempt resulted in striking incoherencies; the leaders declared parliament as the real source of power but their actual concern was the restoration of the system that would reserve ultimate control in state affairs for the executive. All other issues, including the protection of rights and freedoms, were beyond the list of priorities. The rhetoric of constitutional chapters on rights and freedoms resembles Western bills of rights, but the careful commentator still may find the socialist caveats that rights cannot be exercised "to the detriment

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<sup>73</sup> For example, Aleksander Iakovlev, head of the Theory and Sociology of Criminal Law Section of the Soviet Academy of Science, wrote:

Democracy only exists when the most important social and economic issues facing the nation are resolved by freely elected representatives. These representatives, through the soviets, express the sovereign will of the Soviet people. As we have noted, their rights must not be usurped by executive organs of State government or by officials at any level of the political structure.

Aleksander Iakovlev, *Constitutional Socialist Democracy: Dream or Reality?*, 28 COLUM. J. TRANSNAT'L L. 117, 126-27 (1990).

<sup>74</sup> The Constitution of Kazakhstan referred to the organs of power as "cooperating with each other, [and] using the system of restraints and counterbalances." KAZ. CONST. § VI (Basis of the Constitutional System) (repealed 1995). However, the Constitution also described the parliament as "the highest representative body of the Republic of Kazakhstan." *Id.* art. 62 (repealed 1995). The Constitution of Moldova describes the powers as "separate and cooperat[ive] in the exercise of their prerogatives in accordance with the provisions of the Constitution." MOLD. CONST. art. 6, *translated in* 12 CONSTITUTIONS, *supra* note 5. *But see id.* art. 60, § 1 (referring to the parliament as the "supreme representative body").

of the society's interest"<sup>75</sup> and that the protection of rights and freedoms is inseparable from the performance of duties.<sup>76</sup>

The objective factors, which have contributed to the weak record in the protection of human rights in both regions, must be recognized. Blaming presidentialism for problems related to the process of democratization is, however, much less constructive. It must be emphasized that presidentialism as such is not less conducive to the protection of human rights or democracy than parliamentary systems; the authoritarian deviations of presidentialism are detrimental to such protection, however. The presidential system and its core principles are rooted in the concept of balanced powers and without adequate checks and balances, the entire model ceases to operate. In other words, the real threat to the protection of human rights in the post-Soviet states or Latin America is not the governments' intention to borrow from the traditions of presidentialism, but the lack of respect for the concept of limited and balanced government.

In summary, the panacea for human rights-related problems cannot be found in a mere transformation of the "pseudo-presidential" republics to more mixed systems. In both regions, the success of reforms creating a legal framework that adequately protects human rights is not only contingent on a mature political leadership with a convincing and credible vision of the future, but also on the active involvement of the citizenry in political and legal dialogue. The promotion of this dialogue or, more generally, the concept of civic society, usually is not in the best interest of authoritarian leaders who benefit from the *en bloc* support of politically passive societies. Any attempt to animate passive or emotionally reactive minorities must come from the grassroots of society. According to this viewpoint, Latin American multicultural constitutionalism is at least a promising remedy, which may increase public identification with the constitutions. Post-Soviet societies may learn from these experiences in the same way that the Latin American countries may learn from the difficult and often disappointing post-socialist experiments with mixed or semi-presidential systems of governance.

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<sup>75</sup> E.g., UZB. CONST. art. 20.

<sup>76</sup> E.g., UKR. CONST. art. 23.

### III. PLACEMENT OF HUMAN RIGHTS IN THE FRAMEWORK OF THE LATIN AMERICAN AND POST-SOVIET CONSTITUTIONS: POSITIVISTIC VERSUS NATURALISTIC CONCEPTS OF RIGHTS

#### *A. The Language and Philosophy of Rights: Inherent Versus Granted Rights*

A careful examination of the U.S. and early European constitutions reveals numerous differences in the philosophical background of the constitutional protection of rights and freedoms. Although the French Declaration of the Rights of Man and Citizen, with its main assertion that "men are born free and equal in rights,"<sup>77</sup> remained a general philosophical manifesto of the entire Western world, subsequent European constitutions became more pragmatic and did not emphasize the philosophy of inalienable rights.<sup>78</sup> While the opinion prevailed in the United States that rights are not a gift from society but are natural or inherent, Europeans asserted that rights are derived from constitutions.<sup>79</sup> As Wiktor Osiatynski observed, "[A]nother important difference between American and European constitutional orders which is worth discussion is that the American order rests on the principle that power is a grant of freedom and the European order rests on the principle that freedom is a grant of power."<sup>80</sup>

Nineteenth century European constitutions declared that rights are constitutionally protected within the boundaries of the law.<sup>81</sup> Rights and freedoms were granted as a result of legislative actions that constituted new legal situations. Thus, they could not be limited by arbitrary governmental decisions but could be curbed or expanded through further activities of

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<sup>77</sup> DECLARATION OF THE RIGHTS OF MAN AND THE CITIZEN art. 1 (Fr. 1789), available at <http://www.yale.edu/lawweb/avalon/rightsof.htm> (last visited Jan. 11, 2005).

<sup>78</sup> See Geoffrey Bruun, *The Constitutional Cult in the Early Nineteenth Century*, in THE CONSTITUTION RECONSIDERED 259, 263 (Conyers Read ed., 1938).

<sup>79</sup> See Helmut Steinberger, *American Constitutionalism and German Constitutional Development*, in CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 199, 202 (Louis Henkin & Albert J. Rosenthal eds., 1990) (commenting on the fundamental rights in nineteenth-century Germany).

<sup>80</sup> Wiktor Osiatynski, Remarks at the Conference on Constitutionalism and Human Rights (Apr. 11, 1989), in CONSTITUTIONALISM AND HUMAN RIGHTS: AMERICA, POLAND AND FRANCE 146, 156 (Kenneth W. Thompson & Rett R. Ludwikowski eds., 1991).

<sup>81</sup> For example, Article 1 of the French Constitution of 1830, rather than referring to the rights acquired at birth, begins with the statement: "Frenchmen are equal before the law, whatever may be their titles and rank." FR. CONST. of 1830, art. 1, available at <http://www.fordham.edu/halsall/mod/1830frenchconstitution.html> (last visited Aug. 18, 2004).

legislative assemblies. Although the Europeans were slowly adopting the concept of division of powers, they believed that powers are not equal, and that legislative power, being supreme, determines the limitations of fundamental rights.<sup>82</sup> Thus, European constitutions provided elaborate lists of rights that may be exercised only "in the manner expressly provided by law."<sup>83</sup>

Latin American constitutionalism simultaneously looked to the United States system of governance and borrowed from European philosophical traditions.<sup>84</sup> Consequently, the constitution drafters in the region eliminated much of the ideology that had sanctioned the "inalienability" of rights. The language of the bills of rights adopted in the nineteenth century and early twentieth century became predominantly positivistic, referring only to the laws established or recognized by state authorities.<sup>85</sup>

The concept of granted rights also gained a decisive upper hand in socialist constitutionalism. Socialist jurisprudence attempted to distinguish human rights as a philosophical category from fundamental constitutional rights as a political one.<sup>86</sup> Socialist legal theory was not interested in any inherent or natural rights and ignored them completely. John F. Cooper, explaining this position using the example of the Chinese approach, wrote, "To Mao, all rights—civil, political, economic, and social—were 'granted' according to the needs of the party, and the needs of the party changed. Thus, there could be

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<sup>82</sup> JEFFREY GOLDSWORTHY, *THE SOVEREIGNTY OF PARLIAMENT: HISTORY AND PHILOSOPHY* 4 (1999). The concept of parliamentary supremacy was especially emphasized in the British political doctrine which assumed (since the seventeenth century) that the monarch is a part of the crown in parliament. *Id.* at 1.

<sup>83</sup> SPAIN CONST. of 1876, art. 6, *translated in* 2 MODERN CONSTITUTIONS 200-01 (Walter F. Dodd ed., 1909); *see also* NETH. CONST. of 1887, arts. 5, 6, 7, *translated in* 2 MODERN CONSTITUTIONS, *supra*, at 81.

<sup>84</sup> As Robert Barker wrote, "Thus, while Latin Americans subscribed to some French formulations of human rights, they were less enthusiastic about France as a governmental model." Barker, *supra* note 21, at 900.

<sup>85</sup> *See, e.g.*, ARG. CONST. of 1853, art. 14, *translated in* THE CONSTITUTIONS OF THE AMERICAS 14, 15 (Russell H. Fitzgibbon ed., 1948) (stating that "[a]ll inhabitants of the Nation enjoy the following rights, in accordance with the laws that regulate their exercise"); MEX. CONST. of 1915, art. 2, *translated in* THE CONSTITUTIONS OF THE AMERICAS, *supra*, at 498 (stating that "[e]very person in the United Mexican States shall enjoy the guarantees that this Constitution grants"); CHILE CONST. of 1925, art. 10, *translated in* THE CONSTITUTIONS OF THE AMERICAS, *supra*, at 140 (confirming that "[t]he Constitution insures to all inhabitants of the Republic [the enumerated rights]").

<sup>86</sup> *See* Chris Osakwe, *The Common Law of Constitutions of the Communist Party States*, 3 REV. SOCIALIST L. 155, 194-95 (1977).

no constant or unchanging tenet of human liberties and rights."<sup>87</sup> With the exception of a few socialist countries experimenting with judicial review, the constitutional enumeration of granted rights and freedoms did not provide any legal basis for enforcing them in the courts.<sup>88</sup>

When the post-socialist states began drafting their constitutions, it was clear that they would not blindly follow the socialist concept of merely granted rights. However, the question remained as to whether they would entirely reject the anti-naturalistic philosophy of socialist constitutionalism or take a middle-ground approach, emphasizing that a consensus reached by the people at the constitution's adoption is the result of their recognition of some commonly accepted values.

In the meantime, the idea that liberties and rights should be protected as uniform features of human nature was spreading throughout the world and contributed to the theory of core rights, rights which should be universally recognized.<sup>89</sup> The selection of core rights was based on agreement, however, and the final decision concerning which rights should be incorporated was not unquestionable. The drafters of the new constitutions were aware that merely labeling the rights as "natural" might not secure universal acceptance of the rights' fundamental character.<sup>90</sup> Although the concept of universal, inalienable, and imprescribable rights seemed to prevail in modern constitutionalism,<sup>91</sup> reports from regional human rights monitoring groups, especially in Asia, have provided evidence that this concept was not accepted without reservations.<sup>92</sup> Cultural relativism claimed more loudly than ever that

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<sup>87</sup> YUAN-LI WU ET AL., HUMAN RIGHTS IN THE PEOPLE'S REPUBLIC OF CHINA 12 (1988).

<sup>88</sup> Yugoslavia and, since the late 1980s, Poland have experimented with judicial review. See Rett R. Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, 37 INT'L & COMP. L.Q. 89, 89-108 (1988).

<sup>89</sup> Jerome J. Shestack, *The Philosophical Foundations of Human Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS 31, 36-38 (Janusz Symonides ed., 2000).

<sup>90</sup> See Amartya Sen, *Human Rights and Asian Values*, THE NEW REPUBLIC, July 14, 1997, at 33-40; see also U.N. World Conference on Human Rights, *Report on the Regional Meeting for Asia of the World Conference on Human Rights*, U.N. Doc. A/CONF/157/ASRM/8-A/Conf.157/PC/59 (1993).

<sup>91</sup> The adoption of the 1948 UN Universal Declaration of Human Rights seemed to demonstrate the victory of universalism. Michael Rosenfeld wrote, "Set against the genocidal horrors of the Third Reich, the Universal Declaration was grounded in the firm conviction that all humans, by the simple virtue of being human, are equally entitled to the most basic fundamental rights." Michael Rosenfeld, *Can Human Rights Bridge the Gap Between Universalism and Cultural Relativism?*, 30 COLUM. HUM. RTS. L. REV. 249, 249 (1999); see also JACK DONNELLY, *UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE* 89-106 (2d ed. 2003).

<sup>92</sup> See Thomas M. Franck, *Are Human Rights Universal?*, 80 FOREIGN AFF. 191 (2001).

the values respected by some people could not be judged by the norms of others.<sup>93</sup>

Tension between relativity and universality, positivistic legacies, and modern naturalism is clearly visible in recently adopted constitutions. Tracing these influences in newly adopted bills of rights reveals that the drafters' approaches in the post-Soviet states vary and that many drafters of the recently adopted Latin American constitutions followed suit. Furthermore, philosophical differences affected the language of the constitutions, which in both regions began to reflect several basic approaches of the constitutional drafters.

Relatively unambiguous language emphasizing the natural origin of the rights can be found in very few Latin American constitutions.<sup>94</sup> The drafters of the majority of Latin American constitutions either opted for a more positivistic approach<sup>95</sup> or attempted to avoid clear references to "inalienable" rights. The last ones usually presented long lists of "fundamental rights" reserved to all persons.<sup>96</sup> Most social and economic rights, although not included in the group of "fundamental" values, were also granted to everyone,<sup>97</sup> while political rights and duties were reserved exclusively to citizens.<sup>98</sup>

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<sup>93</sup> The countries of the East strongly emphasized that Western universalism is incompatible with their traditions, cultural values, and religious practices. As Rosenfeld correctly observed, Western liberal individualism is by no means the only theory with universal aspirations. This assertion does not mean *per se* that moral values are relative in the sense that there is no objective moral truth. Rosenfeld "confine[s] relativism to the situation in which a normative claim can only be ultimately justified in terms of a contested conception of the good." Rosenfeld, *supra* note 91, at 252.

<sup>94</sup> Article 5 of the 1991 Constitution of Colombia states, "The state recognizes, without any discrimination whatsoever, the primacy of the inalienable rights of the individual and protects the family as the basic institution of society." COLOM. CONST. of 1991, art. 5, *translated in* 4 CONSTITUTIONS, *supra* note 5. The 1992 Constitution of Paraguay states only that "[t]he right to life is inherent to the human being." PARA. CONST. of 1992, art. 4, *translated in* 14 CONSTITUTIONS, *supra* note 5. The Constitution of Honduras repeats the famous formula of the 1789 French Declaration that "[a]ll men are born free and equal in rights." HOND. CONST. of 1982, art. 60 (amended 1991), *translated in* 8 CONSTITUTIONS, *supra* note 5.

<sup>95</sup> For example, the Preamble of the Constitution of Brazil of 1988 states that the people "convened in the National Constituent Assembly . . . to ensure the exercise of social and individual rights." BRAZ. CONST. of 1988, pmb. (amended 2001), *translated in* 3 CONSTITUTIONS, *supra* note 5. The Constitution of Argentina declares, "All inhabitants of the nation enjoy the following rights, in accordance with the laws that regulate their exercise . . ." ARG. CONST. art. 14, *translated in* 1 CONSTITUTIONS, *supra* note 5.

<sup>96</sup> See, e.g., PERU CONST. art. 2.

<sup>97</sup> See, e.g., *id.* ch. II.

<sup>98</sup> See, e.g., *id.* ch. III.



The inalienability of core rights is clearly emphasized in several newly adopted post-socialist constitutions. Some of the drafters, however, similar to the Latin American approach, attempted also to avoid naturalistic phraseology. To use several examples, the Russian Constitution, contrary to the traditions of socialist jurisprudence, declares that the rights and liberties of human beings are "inalienable and belong to everyone from birth."<sup>99</sup> The Ukrainian Constitution also confirms that "[h]uman rights and freedoms are inalienable and inviolable" and that the rights listed in the Constitution are not exhaustive.<sup>100</sup> New laws may guarantee rights which are not covered by the Constitution, but cannot reduce the equal protection of rights and freedoms.<sup>101</sup>

Many of the presidential republics of the former Soviet Union attempted, however, to purge their constitutions of any naturalistic phraseology. For example, the language of the Belarusian Constitution is clearly positivistic: "The State guarantees the rights and freedoms of the citizens of Belarus that are enshrined in the Constitution and the laws, and specified in the State's international obligations."<sup>102</sup> The drafters of the Georgian and Armenian constitutions followed suit.<sup>103</sup> Some other countries of the so-called southern cluster of the former Soviet republics either tried to reach a compromise or the drafters simply did not fully realize that the wording of the constitutional

<sup>99</sup> RUSS. CONST. art. 17, § 2, *translated in 15 CONSTITUTIONS, supra* note 5.

<sup>100</sup> UKR. CONST. arts. 21, 22, *translated in 19 CONSTITUTIONS, supra* note 5.

<sup>101</sup> For more examples of the use of naturalistic language, see the Constitution of Hungary, which "recognizes the *inviolable and inalienable* rights of persons." HUNG. CONST. art. 8, *translated in 8 CONSTITUTIONS, supra* note 5 (emphasis added). The Constitution of Slovakia also declares that "fundamental basic rights and freedoms are inalienable, irrevocable, and perpetual." SLOVK. CONST. art. 12, § 1, *translated in 16 CONSTITUTIONS, supra* note 5. The drafters of the 1997 Constitution of Poland took a more cautious approach. The list of general principles begins with Article 30, which identifies "dignity of the human being" as a sort of Kelsenian "norm of norms" (*Norm der Normen*) being "the source of the freedoms and rights." POL. CONST. art. 30, *translated in 15 CONSTITUTIONS, supra* note 5. The Constitution confirms that this fundamental right is "natural and inalienable." *Id.* In constitutional disputes, however, even this limited dedication of Polish constitutionalism to naturalistic values was considered disputable. Maria Ossowska, *Normy moralne w obronie godnosci czlowieka* [Moral norms in Defense of Human Dignity], 5 ETYKA 7-27 (1969) (describing the disputes surrounding the Polish Constitution). The Preamble of the Lithuanian Constitution states that people have "the inborn right . . . to live and create freely." LITH. CONST. pmbl., *translated in 11 CONSTITUTIONS, supra* note 5. Article 18 of Lithuania's Constitution confirms that individuals are born with inherent rights and freedoms. *Id.* art. 18.

<sup>102</sup> BELR. CONST. of 1994, art. 21 (amended 1996), *translated in 12 CONSTITUTIONS, supra* note 5 (stating that "[t]he Constitution in conjunction with other laws grants the citizens of the Republic of Moldova their rights and freedoms and also lays down their duties upon them").

<sup>103</sup> See ARM. CONST. art. 4; GEOR. CONST. art. 39.

statements might signify the adoption of a positivistic or naturalistic philosophy of human rights.<sup>104</sup>

The lack of certainty or consistency also seems to characterize the constitutions of the post-Soviet states of Central Asia. For example, the Tajik constitutional drafters incorporated into the Constitution the statement that human values—namely, life, honor, dignity—and other individual rights are “inviolable.”<sup>105</sup> Yet they declared that “[t]he rights and freedoms of man and citizen are regulated and protected by the Constitution, the laws . . . [and] international legal acts recognized by [the Republic]”<sup>106</sup> without any reference to their “inalienable” character. The language of the Uzbek Constitution is similarly confusing. On the one hand, the act refers to “[c]itizens’ rights and freedoms, established by the Constitution.”<sup>107</sup> On the other hand, it declares that the rights are “inalienable.”<sup>108</sup> The term “inalienable rights” does not seem to mean inherent rights in the sense of features derivative of human nature and as such incapable of being alienated or surrendered. This interpretation is confirmed by the mere fact that the “inalienable” rights, with the exception of “the right to exist,”<sup>109</sup> are limited to citizens. As the Constitution explains, “inalienable” means rather that “no one [has] the power to deny a citizen his rights and freedoms.”<sup>110</sup> The loss of citizenship, however, may be accompanied by the loss of the “inalienable” rights.

In sum, as illustrated by the above examples, the language of some of the constitutions clearly reflects the drafters’ naturalistic philosophy while some other constitutions are purged almost entirely of any references to the inalienability of rights or to their universal character. Still other constitutions show that, regardless of the drafters’ sensitivity to the philosophical background of the rights, their position is an amalgam of many well-known approaches. These differing attitudes can be traced in the constitutionalism of

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<sup>104</sup> For example, the intentions of the drafters of the Constitution of Azerbaijan are unclear. On the one hand, some statements employ the usual positivistic language stating that only those rights and liberties “enumerated in this Constitution” are implemented in accordance with international treaties. AZER. CONST. art. 12, § II. On the other hand, following the Russian Constitution, and in contrast to the Armenian and Georgian constitutions, the Azerbaijani drafters declared that the people, since the moment of their birth, “enjoy[ ] inviolable, undeniable and inalienable rights and liberties.” AZER. CONST. arts. 12, 24, § I.

<sup>105</sup> TAJ. CONST. art. 5 (amended 2003), *translated in* 18 CONSTITUTIONS, *supra* note 5.

<sup>106</sup> *Id.* art. 14 (amended 2003).

<sup>107</sup> UZB. CONST. art. 19, *translated in* 20 CONSTITUTIONS, *supra* note 5.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* art. 24.

<sup>110</sup> *Id.* art. 19.

both regions, although it should be noted that philosophical preferences have not been affected by the drafters' selection of political models of governance.<sup>111</sup>

### *B. The Length of the Constitutions*

Most modern constitutions are of moderate length, 150 to 170 articles. Some longer constitutions or constitutional drafts have been criticized for being too detailed, while others have been faulted for being too concise, vague, or complicated for readers untrained in constitutional interpretation.<sup>112</sup> Latin American constitutions are relatively longer than post-Soviet constitutions, with several constitutions exceeding 200 articles.<sup>113</sup>

At one extreme, the 1991 Constitution of Columbia, one of the longest and most detailed constitutions in the world, has 380 articles and a separate chapter on transitory provisions comprising fifty-nine articles. The provisions on the rights, freedoms, and duties of citizens and individuals encompass more than one hundred articles, making the provisions more detailed than many of the entire medium-sized constitutions.<sup>114</sup> Further, the Constitution shows several common deficiencies in constitutional engineering. It distributes provisions covering similar areas among too many sections.<sup>115</sup> The Constitution also has thirteen titles and forty-nine chapters, which sometimes overlap and may

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<sup>111</sup> For example, references to "inalienable" rights can be found in the constitutions of parliamentary republics such as Hungary, Poland, or Slovakia, and states with semi-presidential systems such as Azerbaijan, Russia, or Ukraine.

<sup>112</sup> For example, due to criticism concerning the length of the 1992 Ukrainian draft constitution, which contained 258 articles, the June 28, 1996, text of the Ukraine Constitution was trimmed to 161 articles.

<sup>113</sup> For example, the 1972 Constitution of Panama (amended 1978, 1983) has 312 articles; the 1985 Constitution of Guatemala (amended 1993) has 281 articles and twenty-seven transitory provisions; the 1967 Constitution of Bolivia (amended 1994 and 1995) has 235 articles and five transitory provisions.

<sup>114</sup> For example, among the shortest post-Soviet constitutions, the 1993 Constitution of the Kyrgyz Republic has ninety-seven articles, the 1995 Armenian Constitution has 117 articles, and the Latvia Constitution of 1922 has 116 relatively short articles. Adopted two years after the Colombia Constitution, the Constitution of Kazakhstan has 131 articles and thirteen transitional provisions.

<sup>115</sup> For example, Title XII has six chapters regulating similar areas of the state's financial activity, such as "development plans," "the budget," and "distribution of resources and jurisdiction." COLOM. CONST. tit. XII, chs. 2-4. The Title also contains the chapter on "the social purpose of the state and of the public services," *id.* tit. XII, ch. 5, which is general in nature and does not fit the main profile of the Title.

contain just one or two articles each. Finally, the drafters tried to "constitutionalize" too many issues, losing sight of establishing a proper balance between constitutional rules and implementing regulations. At the other extreme is the 1993 Russia Constitution with 137 articles. Although it served as a prototype for many post-Soviet constitutions, it has often been criticized for being too concise and difficult for the general populace to understand.<sup>116</sup>

Constitutional experts often claim that countries lacking substantial constitutional experience and an American judicial system need more detailed constitutions.<sup>117</sup> Nevertheless, while Americans may take pride in the fact that the U.S. Constitution has just seven articles and has survived more than two hundred years, presenting the U.S. Constitution as merely a seven-article charter is misleading. First, several articles of the U.S. Constitution are broken down into lengthy and detailed sections. Second, the Constitution cannot be discussed as a complete act without its amendments and impressive body of judicial interpretations.<sup>118</sup> On the other hand, when the U.S. Constitution was adopted, no one could have predicted the impressive activism of the U.S. courts or the subsequent growth of a body of constitutional law. The drafters of new constitutions face a similar situation, and it would be presumptuous to advise them to adopt longer acts simply because they are new.

The constitutional drafters need to understand that the flexibility and completeness of a constitution, and not simply its length, are crucial. In order to outlast other laws, constitutions should be both constant and elastic; neither of these characteristics, however, guarantee that a constitution will function smoothly.

Commentators have claimed that the framers of the U.S. Constitution deliberately incorporated a solid dose of flexibility, supposedly to facilitate the adaptation of the Constitution to changing circumstances.<sup>119</sup> In fact, careful

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<sup>116</sup> See Boris Yeltsin, *Speech to the Nation Introducing the New Draft Constitution* (Nov. 9, 1993) (BBC World broadcast, Nov. 11, 1993).

<sup>117</sup> E.g., Herman Schwartz, *The Bill of Rights in America and Central East Europe*, 15 HARV. J.L. & PUB. POL'Y 93, 97 (1992).

<sup>118</sup> Schwartz observed, "Our Constitution consists of the 1789 document, the Bill of Rights, seventeen other amendments, and nearly 500 volumes of the U.S. Reports. It is impossible to know the contents of our constitutional law just by reading the Constitution without studying those cases. Developing that body of law, the body that really establishes our constitutional structure, took 200 years." *Id.*

<sup>119</sup> William F. Fox, *Amending the Constitution to Accomplish Social Goals*, 9 SOCIAL THOUGHT 3 (1983).

research has shown that the elasticity of the U.S. Constitution did not stem from the conscious consideration of the factors contributing to constitutional longevity, but rather from the lack of doctrinal antecedents and lack of consensus on the meaning of constitutional terms.<sup>120</sup> As such, drafters should distinguish between flexibility and uncertainty. The former justifies the very existence of constitutional courts, while the latter encourages the courts to arbitrarily fill gaps in legislation.<sup>121</sup>

In summary, there is no single prescription for the length of a constitution. In order to fulfill its goals and to create a firm framework for political, legal, economic, and social stability, a constitution needs to provide sufficient detail. The final product is always a sum of many, sometimes colliding elements, such as the political and legal culture of the society, the constitutional experience of the drafters, the activity of the judiciary, the development of civic society, and the system of judicial enforcement of constitutional rights. The drafters themselves must analyze these factors. Only they can decide whether a complete and flexible constitution has to be long or short; either way, the length should be a deliberate decision and not a side effect of inconclusive constitutional debates.

### *C. Placement of Rights in the Constitution*

The assumption that constitutions must contain a list of fundamental rights was not unquestionable in the beginning of the constitutional era. The American Federal Convention adopted the Constitution without a bill of rights. The Convention thereby departed from the format that had previously existed in some states. The motion of George Mason and Elbridge Gerry to preface the Constitution with a bill of rights was opposed by Roger Sherman of Connecticut on the grounds that "[t]he State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient."<sup>122</sup> The argument that Congress should be trusted in its intention to preserve the rights of the people convinced the delegates of the Convention, who unanimously "(voting as state units) opposed the motion to form a bill of rights

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<sup>120</sup> Rett R. Ludwikowski, *Politicization and Judicialization of the U.S. Chief Executive's Political and Criminal Responsibility: A Threat to Constitutional Integrity or a Natural Result of the Constitution's Flexibility?*, 50 AM. J. COMP. L. 405, 405-08 (Supp. 2002).

<sup>121</sup> *Id.* at 432-36.

<sup>122</sup> ROBERT ALLEN RUTLAND, *THE BIRTH OF THE BILL OF RIGHTS: 1776-1791*, at 116 (Northeastern Univ. Press 1991) (1955).

committee.”<sup>123</sup> However, during the struggle for the ratification of the Constitution, the demand for a bill of rights became widespread, and on May 4, 1789, Madison notified Congress that he intended to introduce the subject of amendments to the Constitution.<sup>124</sup> The Amendments were passed by Congress on September 25, 1789, and ratified on December 15, 1791.

The Preamble of the first French Constitution of September 3, 1791, confirmed that the act was established “upon the principles it has just recognized and declared.”<sup>125</sup> These principles were those contained in the Declaration of the Rights of Man and Citizen, adopted as a separate act two years before the Constitution.<sup>126</sup> The 1795 French Constitution supplemented the Rights of Man with nine paragraphs on the duties of the citizen but the subsequent Napoleonic constitutions were more pragmatic and they dropped the section on the Rights of Man along with a great quantity of the ideology that had sanctioned them.<sup>127</sup>

The aspiration that every written constitution should guarantee fundamental rights had been well-established when the Latin American states began drafting their first constitutions. Bills of rights were incorporated into the Latin American constitutions, but the rights and freedoms were often listed chaotically and blended with provisions about the government’s duties, administrative structures, and revenues of the state.<sup>128</sup> As Russell H. Fitzgibbon observed about Argentina’s constitution-making process,

Moral precepts, endless philosophizing, fantastic rhetoric, and elaborately impractical governmental machinery were common in the first constitutions. The early constituent assemblies were devoted to symbol words—the French trinity of liberty, equality, and fraternity, of course, and federalism, democracy, unity, and

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<sup>123</sup> *Id.*

<sup>124</sup> 1 THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES 247 (J. Gales ed., 1834).

<sup>125</sup> See RETT R. LUDWIKOWSKI & WILLIAM F. FOX, THE BEGINNING OF THE CONSTITUTIONAL ERA 227 (1993) (providing the text of the Constitution).

<sup>126</sup> See *id.* at 225 (providing the text of the Declaration).

<sup>127</sup> See Bruun, *supra* note 78, at 263-64; JOHN H. STEWARD, DOCUMENTARY SURVEY OF THE FRENCH REVOLUTION 571-612, 768-79 (1951) (providing the texts of the Constitutions of 1795).

<sup>128</sup> See, e.g., ARG. CONST. of 1853, pt. I, translated in THE CONSTITUTIONS OF THE AMERICAS, *supra* note 85, at 14-18.

others—and those were clothed with an almost sacramental virtue; the approach was ritualistic, in other words.<sup>129</sup>

Many of the recent Latin American bills of rights still follow this pattern. They are of excessive length and constitutionalize issues which should be dealt with by implementing legislation; they mix rights not only with elaborate social or economic aspirations, but also with provisions about public services, the state's assets, and obligations of the state's institutions.<sup>130</sup>

Bills of rights became typical components of socialist constitutions. Lengthy lists, including numerous economic, social, and cultural rights, were incorporated to demonstrate the superiority of the socialist state over a formalistic capitalist approach to fundamental rights.<sup>131</sup> The placement of rights in the constitutions, however, did not confirm their prominent standing among the constitutionalized values. For example, the 1977 Constitution of the Union of Soviet Socialist Republics listed the rights in Chapters 5 and 6, after the provisions dealing with foreign policy, social development, culture, and the economic and political system.<sup>132</sup>

The bills of rights in the post-Soviet constitutions share many common features. The preambles of the socialist constitutions, which provided many references to the protection of human rights and the humanitarian mission of communism, have been shortened or omitted altogether.<sup>133</sup> The lists of duties have been shortened as well or sometimes eliminated.<sup>134</sup> The appeal to "collective interests," typical of socialist constitutionalism, still is apparent in many provisions on social and economic rights. Emphasizing the real significance of the constitutionalization of human rights, the drafters of the new constitutions decided, almost without exception, to move the bill of rights to the beginning of the constitutional acts.<sup>135</sup> Almost all the constitutions built

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<sup>129</sup> THE CONSTITUTIONS OF THE AMERICAS, *supra* note 85, at 7.

<sup>130</sup> See, e.g., GUAT. CONST. of 1985 (amended 1993) (containing 281 articles, 151 of which are in Title I, addressing "The Human Person, Goals, and Duties of the State"); BRAZ. CONST. of 1988, tit. II (Individual and Collective Rights and Duties) (amended 2001) (containing only seventeen articles in Title II, with some articles comprising more than seventy sections).

<sup>131</sup> See ALEKSANDR KH. MAKHNENKO, THE STATE LAW OF THE SOCIALIST COUNTRIES 55 (B.A. Strashun ed., 1976); see also Osakwe, *supra* note 86, at 155-217.

<sup>132</sup> See LUDWIKOWSKI, CONSTITUTION-MAKING, *supra* note 15, at 605-31 (providing the text).

<sup>133</sup> See *id.* at 229-32 (commenting on the placement of rights in the new constitutions).

<sup>134</sup> *Id.*

<sup>135</sup> The Constitution of Latvia is an exception. The oldest constitution in the region, it was restored in 1992, seventy years after it was adopted. As the Constitution did not have a bill of rights, on December 10, 1991, the Parliament adopted the Law on Individuals and Citizens

enforcement mechanisms into the constitutional texts.<sup>136</sup> While the drafters attempted to make the bills of rights relatively short and provide built-in flexibility, these efforts, unfortunately, often resulted in creating built-in vagueness.

#### *D. Constitutions and Implementing Laws*

A flexible constitution means that the statutory laws should provide details concerning constitutional regulations. This approach, however, does not clearly define "details." The theory makes sense if the constitutional norms declare principles or explain social values or patterns of socially desirable behavior, but leave to the implementing laws the detailed explanation of what the value or pattern means in practice or how the goals identified by the constitutions are achieved. Thus, for example, it may be commonplace to state that citizens have to pay taxes, but this mere statement accompanied by a formula explaining the distribution of tax revenue between the federal government and the federal components of the state may give a normative character to the constitutional provision, even if details will be provided by statutes.<sup>137</sup> References to the implementing laws cannot be used to avoid the formulation of basic constitutional principles as often occurs in post-Soviet constitutions; a constitution also cannot be a substitution for implementing laws, as is frequently the case in many Latin American constitutions.

The proper level of generality in the constitution-making process is always disputable. The addressees of the constitutions often complain that they can find very few authoritative statements in the constitutions.<sup>138</sup> In reality, the proper balance between constitutional principles and statutory regulations cannot be measured purely by the number of references to implementing laws.<sup>139</sup> In addition to the regular descriptions of legislative actions, the

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Rights and Responsibilities, and on October 15, 1998, an amendment inserted a special chapter on fundamental rights into the Constitution. LAT. CONST. § 8.

<sup>136</sup> Turkmenistan, which does not constitutionalize the right of courts to review the constitutionality of laws, is the exception.

<sup>137</sup> Compare POL. CONST. art. 84 (reading almost in a commonplace manner: "Everybody shall comply with his responsibilities and public duties, including the payment of taxes, as specified by law"), with GER. CONST. art. 106 (providing well-balanced provisions on the apportionment of tax revenue with a clear explanation of the scope of the implementing legislation).

<sup>138</sup> See MAURO CAPPELLETTI & WILLIAM COHEN, *COMPARATIVE CONSTITUTIONAL LAW* 21 (1979) (commenting on the "declaratory" character of socialist constitutions).

<sup>139</sup> For example, the commentators on the 1997 Polish Constitution reported that it endlessly



references to "the other laws" usually have a two-fold rationale: they either declare that the constitutionally guaranteed rights can be abridged only by laws and not by administrative decisions, or state that only laws can explain, mitigate, or expand the limits of the authority of the state's organs through detailed regulations. Referring to statutory laws without any clear need often makes the constitutions indeterminate; incorporating details of electoral laws, tax, budgetary, or educational policies into the constitutions themselves makes them vague and complicated. Searching for an adequate balance between constitutional and implementing laws is a big challenge for the constitutionalism of both regions and constitutional experts have to learn from each other—meeting halfway may help them to improve their constitutional products.

### *E. Functions of the Constitutions and Their Normative Character*

Latin American and post-Soviet constitutions were adopted in different political circumstances, which heavily determined their socio-political roles. Latin American constitutions, typically recreated *de novo* or heavily amended with each major governmental change, have a predominantly legitimizing character. They confirm that new governments have been established according to the recognized principles of law or that successor governments have undertaken the rights and obligations of predecessors. In contrast, post-Soviet constitutions play a creative function rather than a consolidating or legitimizing one. They were adopted at a crucial time in the post-socialist states' histories, when the so-called historical moment of creating a new political system coincided with the constitutional moment of drafting a new constitution.<sup>140</sup> The constitutions were expected to change, not to reform or

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refers citizens to statutory regulations. In fact, the objection is not confirmed by comparative analysis. The German Constitution, comprised of 146 articles, is shorter than the Polish Constitution (243 articles), and refers its readers to "further regulations of the law" in forty-seven instances, amounting to approximately thirty-one percent of the constitutional articles. The Polish text does so eighty-seven times, which means that reference to the statutory laws can be found in thirty-five percent of its articles, but the relatively short Constitution of Kazakhstan (131 articles) does so only twenty-five times, amounting to nineteen percent of the articles. The number of references to "the detailed regulations of the statutory laws" does not make the Polish or German constitutions less clear than the Constitution of Kazakhstan.

<sup>140</sup> For comments on the distinction between different constitutional functions, see Elster, *supra* note 2, at 365; BRUCE A. ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* ch. 4 (1992); Rett R. Ludwikowski, *Types and Functions of a Constitution*, in *PRAWO KONSTYTUCYJNE PORÓWNAWCZE* [Comparative Constitutional Law] 29-38 (2000).

sanctify, recent political transformations.<sup>141</sup> The question remains as to what extent the different roles played by the constitutions of the two regions contributed to the declaratory or normative character of the constitutional texts.

Commentators often claim that the clear-cut distinction between Western and socialist constitutions was that socialist constitutions contain only "declarations" and "programmatic provisions," while Western constitutions protect rights and freedoms which can be defended in court.<sup>142</sup> Commentators also assert that the post-Soviet states were supposed to give their bills of rights a real normative character.<sup>143</sup> In fact, neither claims are fully corroborated by a comparative analysis of the constitutions of Latin America and the states of former Soviet dominance.

First, the differences between Western and socialist constitutions were often overplayed. Western constitutions were not necessarily drafted with few or no declaratory statements or confined to nothing more than rules of law, while socialist and post-socialist acts were not necessarily manifestos, codifications of economic will, or declarations of ideals that contain no legal norms.<sup>144</sup> Indeed, in most countries, socialist and neo-colonial countries included, constitutions are mixtures of legal and non-legal statements.<sup>145</sup> The clear-cut distinction between Western and socialist constitutions did not mean, for example, that Western proclamations of economic, social, and cultural rights were less declarative than those found in the constitutions of socialist or post-socialist countries. Despite deficiencies in the socialist systems in the enforcement of rights and the low level of quality of social services offered by the governments, the socialist states provided many benefits guaranteed by the constitutions, such as full employment, low-cost housing, and free access to education and health services. Claiming that all of the socialist constitutional provisions, even those formulated in a normative way, were merely window-dressing would be an overstatement.

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<sup>141</sup> Ludwikowski, *supra* note 140, at 37.

<sup>142</sup> Cf. Osakwe, *supra* note 86, at 155-217.

<sup>143</sup> See Ludwikowski, *supra* note 3, at 125-27.

<sup>144</sup> Osakwe, *supra* note 86, at 159.

<sup>145</sup> The drafters in the socialist states believed that they produced acts with a truly prescriptive character. Aleksandr Kh. Makhnenko wrote: "What is the place of constitutional norms in the system of socialist law as a whole? Since a constitution is a fundamental law, its norms have supreme juridical force. All the norms established by conventional laws and other legal acts must be in accordance with constitutional norms." MAKHNENKO, *supra* note 131, at 65.

Second, it has often been asserted that socialist acts failed to provide enforcement mechanisms for the constitutional laws and therefore were only decorative.<sup>146</sup> This distinction has been exaggerated as well. Some Western constitutions are not supreme over the legislatures,<sup>147</sup> while others do not provide for judicial review.<sup>148</sup>

The real difference stemmed from the clear contrast between theory and practice, which made many socialist and post-colonial legal concepts merely legal fictions. Although the gap between theory and practice was less perceptible with regard to social, economic, and cultural rights, it existed in the areas of personal, political, civil, and due process rights; as a result, socialist constitutions simply did not function in a political reality.

A comparison of Latin American and post-Soviet constitutions confirms that the gap between constitutional theory and practice still exists in both regions. The mere number of norms contained in a constitution does not by itself guarantee that the constitution will function in any given geopolitical circumstance. Even the best constitutional texts are hardly more than a piece of paper if they are not supported by the government, respected by societies, and applied in practice.

In fact, the Latin American acts have more philosophical declarations than the relatively crisp and short post-socialist constitutions. The constitutional drafters in both regions, however, included awkward provisions which appeared to signify the importance of some social problems, but in fact provided no command and had no real substance. Such constitutional provisions as "the law may be adopted," "the provisions may regulate" "citizens . . . shall pay taxes and fees as prescribed by the law," or "religion . . . may be taught in schools," are simply meaningless.<sup>149</sup>

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<sup>146</sup> See CAPPELLETTI & COHEN, *supra* note 138, at 21.

<sup>147</sup> For example, the 1919 Weimar Constitution of Germany allowed amendment of the constitution by the vote of a qualified two-thirds majority of both chambers. As the quorum of the chambers was also two-thirds, the amendment could be adopted by the vote of four-ninths of the chambers' membership. The Constitution thus could be amended by the vote of less than half of the deputies. See NIGEL FOSTER, *GERMAN LEGAL SYSTEMS* 24-27 (2d ed. 1996).

<sup>148</sup> For example, judicial review in the United Kingdom presumably conflicted with the principle of parliamentary supremacy. The accession of the United Kingdom to the European Community required the courts "to override any rule of national law found to be in conflict with any directly enforceable rule of Community law." *Regina v. Sec'y of State for Transp. ex parte Factortame Ltd.* (No. 2), [1991] 1 A.C. 603, [1991] 1 All E.R. 70 (H.L. 1990).

<sup>149</sup> See, e.g., COLOM. CONST. art. 57, *translated in* 4 CONSTITUTIONS, *supra* note 5 ("The law may establish incentives so that workers may participate in the management of enterprises."); *id.* art. 66 ("The provisions enacted in the field of private or public credit may regulate the special

Latin American and post-Soviet constitutions play different roles, but their bills of rights show common deficiencies. Although the regions' different systems of judicial enforcement have been constitutionalized, neither system operates properly and judges in both regions represent a variety of extreme attitudes ranging from passivity and political submissiveness to activism, which does not allow them to distinguish legal intervention from the inclination to interfere in everyday politics. In sum, while most constitutional provisions appear to be legally binding norms, a gap between theory and practice exists in both regions and serves to weaken public identification with the constitution and create a high level of disapproval concerning its provisions.<sup>150</sup>

#### IV. MINORITY AND GROUP RIGHTS

##### A. *Individual Versus Group Rights*

The collisions between individual and group rights are a *leitmotiv* of the constitutionalization of bills of rights in regions with strongly diversified societies. In such nations, the realistic chances for the creation of one unified community of equal individuals are weak, and problems concerning group rights come to the forefront of constitutional disputes. In Latin America and post-Soviet states, the debate over the rights of citizens, foreigners, social groups, and ethnic and religious minorities provoked arguments in support of several—sometimes colliding—positions.

On the one hand, the drafters of the new constitutions were quite aware of the liberal background of the modern Western philosophy of human rights. Liberals traditionally claimed that the protection of individual values was the best way to protect the well-being of entire societies; communities thrived when individuals were allowed to develop their initiative and energy according

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conditions of agricultural credit . . . ."); *id.* art. 68 ("Individuals may create educational institutions. The law will establish the conditions for their creation and management."); KYRG. CONST. of 1993, art. 25 (amended 2003), *translated in* 10 CONSTITUTIONS, *supra* note 5 ("Citizens of the Kyrgyz Republic shall pay taxes and charges as prescribed by the law of the Kyrgyz Republic."); POL. CONST. art. 53, § 4, *translated in* 15 CONSTITUTIONS, *supra* note 5 ("The religion of a church or other legally recognized religious organization may be taught in schools, but other people's freedom of religion and conscience shall not be infringed.").

<sup>150</sup> See Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, in CONSTITUTIONAL CULTURES, *supra* note 8, at 65.

to their own capacities.<sup>151</sup> As the nineteenth century British utilitarians asserted, a society was nothing but an aggregation of individuals; in this aggregation, each individual was to be counted for nothing more than one unit.<sup>152</sup> Thus, liberals argued that individual rights should be defined by equal protection guaranteed to everyone<sup>153</sup> rather than by a person's group membership. The state should only guard these rights, maintain neutrality, and protect individuals against discrimination.<sup>154</sup>

On the other hand, the application of the liberal doctrine of human rights in multicultural societies has always been controversial.<sup>155</sup> Liberal individualism, stimulating competition, could promote the development of market mechanisms and become a source of economic prosperity in a region, but it could also be counterproductive to efforts to unite politically inexperienced and ethnically diversified societies. This threat was alarming for Latin

<sup>151</sup> John Stuart Mill claimed that:

[I]ndividuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human beings . . . what more . . . can be said of any condition of human affairs, than that it brings human beings themselves nearer to the best thing they can be? [O]r what worse can be said of any obstruction to good, than that it prevents this?

John Stuart Mill, *On Liberty*, in CLASSICS OF MORAL AND POLITICAL THEORY 876, 907 (Michael L. Morgan ed., 3d ed. 2001) (1859) [hereinafter CLASSICS].

<sup>152</sup> For example, Jeremy Bentham wrote: "The community is a fictitious *body*, composed of the individual persons who are considered as constituting as it were its *members*. The interest of the community then is, what?—the sum of the interests of the several members who compose it." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 12 (J.H. Burns & H.L.A. Hart eds., Oxford Univ. Press 1970) (1789).

<sup>153</sup> John Stuart Mill elaborated on the concept of equal freedom for individuals:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful objects of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant alignment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others.

John Stuart Mill, *On Liberty*, in CLASSICS, *supra* note 151, at 907.

<sup>154</sup> See DONNELLY, *supra* note 91, at 205-08.

<sup>155</sup> See generally Susan M. Okin, *Is Multiculturalism Bad for Women?*, in IS MULTICULTURALISM BAD FOR WOMEN? 7 (Joshua Cohen et al. eds., 1999) (commenting on the impact of multiculturalism on women's rights).

American countries. In a region dominated by elites, the increase of political participation by indigenous groups, women, peasants, and racial or religious minorities had been a goal of fundamental importance.<sup>156</sup> The drafters of the constitutions had to produce laws applicable to communities with a blend of cultural, racial, and religious traditions. The success of Latin American constitutionalism had to be evaluated against its ability to create a well-balanced system of protection for individual rights, as well as for the rights of minorities and other disadvantaged groups.

The problem was equally sensitive for the post-Soviet societies, which had not forgotten the communist experiments with "collective mentality." According to Marxism-Leninism, respect for collective values was to follow the growing unity of the individual and society.<sup>157</sup> Socialist doctrine promoted the ideas of ultimate equality, freedom, and justice, and suggested that these goals could be accomplished only by a total reconciliation between individual and social interests.<sup>158</sup> Awareness of the superiority of a shared interest to that of individual interest was supposed to create a "collective mentality"—a precondition for the further evolution of the society toward communism. The individual's rights and duties were to be determined by society.<sup>159</sup>

The attempt to create a collective mentality failed, however. The fact that millions of people were encouraged, even forced, to spy, watch, and denounce others drastically affected public morale. Many people believed that a collective mentality would serve as an instrument for the destruction of the individual approach to life and promote the complete atomization of society. The fear of the communal approach to human rights was spread by the power of mass neurosis. The drafters of the new constitutions faced a dilemma. On the one hand, they understood that excessive protection of group rights might be associated with old-fashioned attempts to develop collective values. On the other hand, individualism alone was equally unfit to address the problems of the region. With the exception of Poland, a truly homogeneous country with

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<sup>156</sup> See Victor Rodriguez Rescia & Marc David Seitles, *The Development of the Inter-American Human Rights System: A Historical Perspective and a Modern-Day Critique*, 16 N.Y.L. SCH. J. HUM. RTS. 593 (2000).

<sup>157</sup> See SOVIET POLITICAL SCI. ASS'N, INST. OF STATE & LAW, *THE SOVIET STATE AND LAW* 218 (V.M. Chkhikvadze ed., Yuri Sbodnikov trans., 1969).

<sup>158</sup> *Id.*

<sup>159</sup> *THE LAW OF THE SOVIET STATE* 167 (Andrei Y. Vyshinsky ed., Hugh W. Babbo trans., 1948). As Andrei Y. Vyshinsky claimed, the only source of power is "the will of the people" as a whole. *Id.* at 169.

minorities constituting no more than 2.6 percent of the population,<sup>160</sup> all other post-socialist republics have substantial ethnic minorities well prepared to articulate their own rights.<sup>161</sup> The minorities' problems thus could not be resolved by mere application of the principle of equal treatment of all individuals. The drafters of the new constitutions had to develop a compromise, which would help prevent clashes between group aspirations and the most fundamental rights of individuals.

### *B. Colliding Group Interests*

Other problems, aside from conflicts between individual and group interests, are equal protection of minorities themselves and potential clashes between group interests and international commitments of states.<sup>162</sup> Conflicts between the fundamental obligations of the state and crucial claims of certain groups, as well as parochial or marginal aspirations of other groups, pose an important challenge and require the evaluation of reasonable needs and equitable access to the state's resources.<sup>163</sup> Relevant factors which might be considered in an attempt to resolve colliding group interests include, but are not limited to, the serious threat of a group's extinction; the economic, social, and cultural importance of a group; the importance of maintaining a group's identity; historically-recognized discrimination against a group by the majority or other minority groups; comparative costs of alternative means of meeting a group's claims; availability of other remedies; the degree of internal self-determination versus separatist inclinations of a group; and the evaluation of aspirational objectives in light of internationally-recognized rights of minorities. Each factor should be weighed against the other factors.

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<sup>160</sup> According to Anna Kosmatka and Beata Przybylska, "the population of [the] national minority is near to 1.2 million people. It is about 2-3% of Polish citizens." National Minority Protection in Poland, at [http://www.affenraa.dk/m99\\_nationalminorityprotection.html](http://www.affenraa.dk/m99_nationalminorityprotection.html) (last visited Oct. 10, 2004).

<sup>161</sup> *Deported, Scattered or Missing: Poland's Minority Communities*, 1 CENT. EUR. REV. 19 (Nov. 1, 1998), at <http://www.ce-review.org/99/19/nieuwsma19.html>.

<sup>162</sup> For example, in the Latin American countries, it is a valid question whether native minorities deserve better protection than immigrants who voluntarily join a multicultural society. See Rosenfeld, *supra* note 91, at 273.

<sup>163</sup> To illustrate the possible clashes between the interests of the state and the constitutional rights of aboriginal groups, Rosenfeld analyzes the Canadian Supreme Court's decision evaluating the fishing needs of the Mohawk tribe against ecological concerns of the state. *Id.* at 276 (discussing *Regina v. Adams*, 3 S.C.R. 101 (1996)).

Several measures directed at improving the situation of minorities have been tested. Regionalism, which recognizes the authority of the central government, but also delegates some power to the regions provided some protection for group rights. In Belgium, Switzerland, Italy, Canada, and many other countries with historically distinctive provincial interests, regionalism provided cultural autonomy or at least representation of identifiable communal concerns, with varying levels of success.<sup>164</sup> In addition, it facilitated linguistic minorities' pursuit of cultural and educational rights.<sup>165</sup>

Further, obstacles to effective political participation by minorities may be overcome by electoral systems, specifically proportional representation or other methods that reserve a minimum number of seats in legislative or executive organs to minorities.<sup>166</sup> In some countries, proportional representation is guaranteed through affirmative action programs, quotas, or hiring preferences for minority group members.<sup>167</sup>

### *C. Ethnic Rights and National Minority Rights: Internationalization Versus Regionalization of the Movements for Group Rights*

The previous subsection presented problems with the constitutional protection of group rights shared by both regions. More profound research reveals not only similarities, but also important differences in the history of the

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<sup>164</sup> Regionalization requires incorporation of the principle of power-sharing into the system of government. For example, in Switzerland, the seven-member Federal Council traditionally consisted of four or five persons originating from the German-speaking regions, one or two from the French-speaking part, and one from the Italian-speaking part. 4 LEGAL SYSTEMS OF THE WORLD: A POLITICAL, SOCIAL, AND CULTURAL ENCYCLOPEDIA 1574 (Herbert M. Kritzer ed., 2002) [hereinafter LEGAL SYSTEMS]. In Belgium, the Constitution states that, with the exception of the prime minister, the Council of Ministers must consist of an equal number of French-speaking and Dutch-speaking ministers. BELG. CONST. art. 99.

<sup>165</sup> See David Wippman, *Practical and Legal Constraints on Internal Power Sharing*, in INTERNATIONAL LAW AND ETHNIC CONFLICT, 211 (David Wippman ed., 1998).

<sup>166</sup> Several constitutional arrangements illustrate this approach. For example, under the Belgian Constitution, the Dutch electoral college elects twenty-five senators and the French electoral college elects fifteen senators. BELG. CONST. art. 67, § 1. The amendments to the Lebanese Constitution, adopted in August 1990, provided for the proportional representation of Christians and non-Christians in the parliament and the cabinet. Emile Sahliyah, *Lebanon*, in 2 LEGAL SYSTEMS, *supra* note 164, at 872.

<sup>167</sup> The 1991 Constitution of Romania guarantees, "Organizations of citizens belonging to national minorities that do not win in the elections the necessary number of votes to be represented in Parliament, each have the right to one deputy seat, in accordance with the election law." ROM. CONST. art. 59, *translated in 15 CONSTITUTIONS*, *supra* note 5.



struggle for the protection of group rights in Latin American and post-Soviet states.

First, the transformation of grassroots social activities for political, economic, social, and cultural rights into transnational human rights movements is more advanced in Latin America than in the post-socialist states due to both necessity and opportunity. Major internal conflicts between factions of military governments, the democratic opposition, leftist guerrillas, and right-wing paramilitaries touched almost all Latin American countries, affecting the regional record in human rights protection.<sup>168</sup> Although efforts to improve the legal framework and institutional mechanisms in order to protect the population should not be disregarded, implementation of such protections lagged and serious problems remained in many areas. Wide-scale conflicts between military governments and armed opposition left civilians extremely vulnerable and exposed to arbitrary imprisonments, relocation actions, widespread panic, and an increased feeling of social isolation.<sup>169</sup> The common problems stimulated the grassroots activities of peasants, workers, scholars, lawyers, and journalists. The mobilization of major social groups, ideologically strengthened by liberation theology,<sup>170</sup> created a platform of communication, which facilitated the rapid process of internationalization of human rights movements in this region.<sup>171</sup>

The trend toward internationalization of human rights movements was perceptible among ethnic minorities as well.

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<sup>168</sup> In 1997, Edward L. Cleary wrote:

Military rule now covered all but two South American countries and all but one Central American country. Brazil, the largest Latin American country, and Bolivia, among the smallest, suffered military takeovers in 1964. Other countries followed in the 1960s and 1970s. The regimes of the 1960s were considered soft dictatorships (*dictablandas*). Later regimes became brutally harsh.

CLEARY, *supra* note 36, at 1; see also Roseann M. Latore, *Coming out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT'L & COMP. L. REV. 419 (2002) (providing a more general study of human rights violations by military regimes).

<sup>169</sup> See, e.g., NICARAGUA: A COUNTRY STUDY 42 (Tim L. Merrill ed., 1993) (commenting on the treatment of the Miskito indigenous group by the Sandinista government).

<sup>170</sup> See generally ISMAEL GARCIA, *JUSTICE IN LATIN AMERICAN THEOLOGY OF LIBERATION* (1987).

<sup>171</sup> See CLEARY, *supra* note 36, at 96-102.

Indigenous people were able to participate in the international discourse on rights because they had begun organizing in the 1970s. By the 1980s, when most Latin American countries shifted from authoritarian-military to elected-civilian government, indigenous organizations had proliferated and matured, and had created an inter-American network of advocacy and mutual support.<sup>172</sup>

The situation of the republics of the former Soviet Union is complex in a different way. Violations of human rights have been notorious in all communist countries<sup>173</sup> and they have remained a major concern for the new post-Soviet states. Since their emergence, the new governments have attempted to improve their record and have claimed that the new constitutions would create an appropriate background for monitoring agencies to evaluate the effectiveness of governmental policies.

However, the new approach contributed to confusion and suspension between the socialist legacy and the promised "new beginning." For decades, communist propaganda had ridiculed Western moral and social values. It presented people in socialist countries with pictures of rotten societies living in capitalist and Mafia-ruled urban jungles. As a result, the population has experienced confusion about Western standards of human rights protection,<sup>174</sup> remained politically passive, and failed to recognize the sanctity of constitutions.<sup>175</sup> Confusion about the uncertain benefits of adopting universal standards of human rights protection has been a major obstacle to cross-boundary communications between human rights groups. In sum, internationalization of human rights in the post-Soviet states does not mean integration with international human rights movements; rather, it means toleration for

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<sup>172</sup> Van Cott, *supra* note 4, at 1.

<sup>173</sup> The record of human rights violations in socialist states need not be reexamined. It is enough to say that the declarations of the post-socialist constitutions created no direct rights that could be claimed by individuals against the state. According to Robert G. Neumann, the declarations were "merely a promise that the legislature would be guided by certain principles." Robert G. Neumann, *Constitutional Documents of East-Central Europe*, in CONSTITUTIONS AND CONSTITUTIONAL TRENDS SINCE WORLD WAR II 175-76 (A.J. Zurcher ed., 1979).

<sup>174</sup> See Rett R. Ludwikowski, *Constitutional Culture of the New East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 61 (2000).

<sup>175</sup> See 1 COMPARATIVE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *supra* note 1, at 21-138 (analyzing the situation in the more politically and economically developed countries, such as the Baltic states or even larger cities in Russia and Ukraine).

human rights monitoring by governmental and non-governmental organizations and accession to the most important human rights treaties.

Second, the historical background of the struggles for the protection of group rights in both regions is different and the regions have different priorities. In most of North America, Native Americans were separated from European immigrants; in contrast, the colonization of Latin America produced a much stronger race mixture. The Iberian colonists brought relatively few women with them, which resulted in the production of communities that were a blend of cultures, races, religions, customs, and traditions.<sup>176</sup> Although the Spanish and Portuguese elites retained their cultural dominance, other communities were highly ethnically diversified.<sup>177</sup> The Latin American melting pot was not congenial to the development of an internal group identity. In this social environment, the self-identification process of indigenous people has occurred relatively faster than among other groups.<sup>178</sup>

Indigenous people comprise about ten percent of the population in the region, ranging from one percent of the population in Brazil to approximately sixty percent in Guatemala and Bolivia.<sup>179</sup> The internal claims of indigenous groups for "collective dignity"<sup>180</sup> are stronger than ever and constitutional recognition of their rights, including the application of indigenous customary law to the regulation of internal affairs, collective property rights, and the right to bilingual education, is widespread in the region.<sup>181</sup> The protection of the rights of ethnic minorities of African origin is less clearly recognized, but some constitutional drafters in countries such as Colombia and Ecuador

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<sup>176</sup> See Ralph L. Woodward, Jr., *Latin America*, in 15 FUNK AND WAGNALLS NEW ENCYCLOPEDIA 418 (1986). See generally RALPH WOODWARD, *CENTRAL AMERICA: A NATION DIVIDED* (1976) (providing more general comments on Latin American history, people, and problems).

<sup>177</sup> See generally Michael Posner, *Human Rights and Non-Governmental Organizations on the Eve of the Next Century*, 66 FORDHAM L. REV. 627 (1997).

<sup>178</sup> See generally VAN COTT, *FRIENDLY LIQUIDATION*, *supra* note 39.

<sup>179</sup> Van Cott, *supra* note 4, at 41.

<sup>180</sup> Liberals recognize dignity as a value fundamental to an individual's identity, which he may claim regardless of his group membership. Critics of the liberal and individualistic approaches to dignity have asserted that individuals often do not live alone and do not claim rights against society, ethnic, or indigenous groups. Thus, according to the critics, human communities can also demand recognition of their "collective dignity." Rhoda Howard wrote, "[I]n most known past or present societies, human dignity is not private, individual, or autonomous. It is public, collective, and prescribed by social norms." Rhoda Howard, *Dignity, Community, and Human Rights*, in HUMAN RIGHTS IN CROSS-CULTURAL PERSPECTIVE 84 (Abdullahi An-Na'im ed., 1991).

<sup>181</sup> *Id.* at 1-7.

showed an inclination to recognize the African minorities among "original inhabitants" rather than among ad hoc minorities.<sup>182</sup>

On the other hand, the tendency to resolve the problems of indigenous people by the creation of autonomous territories in Latin America is limited. Nicaragua's attempt to create autonomous regions for Miskitu Indians was a failure<sup>183</sup> and, in fact, very few states constitutionalized the right of indigenous people to create their own municipal autonomous territories. To give some examples, references to the political autonomy of indigenous people can be found in Colombia's Constitution, in Guatemala's 1995 Accord on Indigenous Rights and Identity, and Mexico's 1996 San Andre's Accord on Indigenous Rights.<sup>184</sup>

The situation in the region of former Soviet dominance differs, however; the autonomy of national minorities is the primary issue for the post-Soviet states. In the countries of the former Soviet Union, most of the original nationalities, with the exception of those relocated by the Soviet regime, still live in the territories once conquered by the Russians.<sup>185</sup> On the one hand, the communist regimes tried to atomize all communities and break all manifestations of human individuality; on the other hand, for the price of loyalty to the Communist Party, Moscow pretended to respect various national claims for autonomy.<sup>186</sup> This was reflected in the national structure of the former Soviet Union, which was composed of autonomous Soviet socialist republics, autonomous regions, and autonomous areas.<sup>187</sup> Thus, in spite of various anti-Russian sentiments, the Soviet totalitarian regime was able to control almost

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<sup>182</sup> See, e.g., COLOM. CONST. art. 55 (transitory), *translated in 4 CONSTITUTIONS, supra* note

5. The provision states:

Within the two years following the entry into effect of the present Constitution, the Congress will issue, following a study by a special commission that the government will create for that purpose, a law which will take cognizance of the Black communities which have come to occupy uncultivated lands in the rural zones adjoining the rivers of the Pacific Basin . . . .

*Id.*

<sup>183</sup> See Van Cott, *supra* note 4, at 48, 54 n.5.

<sup>184</sup> See *id.* at 47-48.

<sup>185</sup> See DONALD D. BARRY & CAROL BARNER-BARRY, *CONTEMPORARY SOVIET POLITICS: AN INTRODUCTION* 262 (2d ed. 1982).

<sup>186</sup> "[I]n the USSR the members of the various nationalities in a large proportion still live on the land of their forebears occupied for centuries and are till in touch with reminders of their religious and cultural heritages." *Id.* at 262.

<sup>187</sup> RUSS. CONST. chs. 9-11, in LUDWIKOWSKI, *CONSTITUTION-MAKING, supra* note 15, at 617-19.

all resistance and undercut separatist ambitions of national leaders without actually mixing national minorities.

The discussion concerning various concepts of regionalization of the Russian Federation and the rights of minority nationalities in other post-Soviet republics resurfaced after the fall of communism. In Russia, the problem generated an especially vivid debate during the process of drafting the 1993 Constitution. The adoption of the Constitution clarified the sensitive issue of the distribution of power between federal authorities and components of the republic. The adoption of the Constitution was preceded by two 1992 treaties on the delineation of spheres of jurisdiction between the Russian Federation and its components. The treaties vested "all state power" in the republics without giving a comparable "sovereign" status to the regions, which were recognized only as "autonomous parties to international and foreign economic relations."<sup>188</sup> The issue, fervently discussed at the constitutional convention of June 1993, almost blocked the progress of the constitutional process and forced Yeltsin to establish a special "conciliatory commission" to negotiate a compromise between the parties in dispute. As Dwight Semler explained, "The regions want equal 'sovereign' status, while the republics believe they merit special status by reason of their ethnic or national foundations. In addition, the republics resent the fact that the regions are by and large much more prosperous and rich in resources."<sup>189</sup>

The 1993 Russian Constitution purged the text of almost all references to the "sovereignty" of Russia's republics and declared that the Constitution prevails over any conflicting articles of the Federation Treaty.<sup>190</sup> The statement that "the sovereignty of the Russian Federation extends to the whole of its territory," was made a fundamental principle of the constitutional system, and the reference to the Federation Treaty in Yeltsin's previous draft "as the basis and an integral part of the Constitution" was dropped.<sup>191</sup>

The adoption of the Constitution nevertheless did not hamper the disintegration of central power in Russia. Russian republics and regions wanted more autonomy and some, such as Chechnya, sought to leave the Russian state

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<sup>188</sup> See 1 COMPARATIVE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, *supra* note 1, at 349-52. The Federation Treaties were signed on March 13, 1992, by President Yeltsin and most leaders of the autonomous republics and other ethnic and geographical regions. *Id.*

<sup>189</sup> Dwight Semler, *Summer in Russia Brings No Real Political Progress; Federative Issues Dominate Constitutional Discussions*, 2 E. EUR. CONST. REV. 20-21 (1993).

<sup>190</sup> RUSS. CONST. art. 4, § 2.

<sup>191</sup> RUSS. CONST. arts. 2, 58 (draft constitution proposed by Yeltsin on April 29, 1993).

entirely.<sup>192</sup> Russia's position that the 1993 Constitution provided no legal possibility for secession from the Russian Federation resulted in the poorly prepared campaign intended to crush the secessionist movement in Chechnya.<sup>193</sup>

Putin inherited the secession issue<sup>194</sup> and immediately following the election, presented a package of measures aimed at restructuring the central administration's relations with the administrative districts of the Russian Federation. The reform grouped Russia's eighty-nine regions into seven federal districts run by presidential appointees and diminished the power of regional governors and local *nomenklatura* people.<sup>195</sup> The success of the project has been limited; corruption and Mafia-like politics still undermine the stability of the entire country and most post-communist territorial leaders are beyond the control of the federal government.<sup>196</sup>

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<sup>192</sup> In 1991, Dzhokhar Dudayev declared Chechnya independent. David Johnson & Borgna Brunner, *Timeline of Key Events in Chechnya, 1830-2004*, <http://www.infoplease.com/spot/chechnyatime1.html> (last visited Oct. 5, 2004).

<sup>193</sup> The clumsy invasion of the republic and the Russian troops' uncoordinated assaults on Chechen villages resulted in humiliating attacks on Yeltsin in the Russian Duma and in the media, which presented him as bombastic and incompetent. Yeltsin's secret decrees, which he issued without an official declaration of a state of emergency, were challenged in the constitutional court, and his chances for reelection in 1996 were seriously jeopardized. See *On Measures to Reestablish Constitutional Law and Order in the Chechen Republic*, Secret President Decree No. 2137, Nov. 30, 1994 (repealed Dec. 1994); see also Andrew Nagorski & Russell Watson, *Yeltsin's Hollow Victory*, NEWSWEEK, Jan. 29, 1996, at 32-33; Bruce W. Nelan, *Mr. Yeltsin's Ugly War*, TIME, Jan. 29, 1996, <http://www.time.com/time/archive/preview/0.10987.1101960129-135389.00.html>; Igor Belsky, *Constitutional Court to Hold Hearings on Chechnya Decrees*, TASS, June 30, 1995, at 1.

<sup>194</sup> Violations of human rights in Chechnya were still reported after Putin took over the presidency from Yeltsin. See Physicians for Human Rights, *Endless Brutality: Ongoing Human Rights Violations in Chechnya*, Jan. 23, 2001, available at [http://www.phrusa.org/research/chechnya/chech\\_rep.html](http://www.phrusa.org/research/chechnya/chech_rep.html). In 2001, the Helsinki Group for Human Rights in Russia wrote an open letter to Putin: "The continuation of the conflict could lead to the total extermination of the civilian population in Chechnya and to an increase in violence and crime in our country." *Rights Group Fears Totalitarian Tendencies in Russia* (May 13, 2001), at <http://www.1worldcommunication.org/totalitariantendencies.htm>.

<sup>195</sup> An exception was former Prime Minister Sergei Kirienko, who was appointed to run the Volga district. See Andrew Meier & Yuri Zarakhovich, *Putin Tightens His Grip*, TIME (Europe), May 29, 2000, at 22, available at <http://www.time.com/time/europe/magazine/2000/0529/pitinplans.html>.

<sup>196</sup> U.S. Representative Curt Weldon wrote: "Billions of dollars siphoned off that should have gone to build roads and bridges and schools for the Russian people, siphoned off for oligarchs setting up Swiss bank accounts, U.S. real estate investments, and what did America do? We sat back and pretended we didn't know it was happening." Representative Curt Weldon, *Problems*

Ukraine experienced similar problems with national minorities' ambitions for autonomy. In 1995, the process of constitution-making in this country was disrupted by the Crimean crises during which the Ukrainian Parliament suspended the 1992 Crimean Constitution and abolished the autonomous republic's office of the president. This crisis became more serious when the Crimean Tatars, the ethnic group deported by Stalin during World War II, began returning to the region demanding more independence and opposing Russian influence in the area.<sup>197</sup>

One of the most serious examples of ethnic struggles in the former Soviet republics was the long-running conflict between Armenia and Azerbaijan regarding the status of the Nagorno-Karabakh region. Fighting in this enclave of Azerbaijan, populated mostly by Armenians and recognized by them as their historic land, broke out in 1988 and lasted until 1994,<sup>198</sup> when an opportunity for compromise and peaceful settlement of the dispute emerged.<sup>199</sup> Especially problematic was the treatment of 18,000 Armenians and part-Armenians living

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*and Opportunities*, in HERITAGE FOUNDATION, HERITAGE LECTURES NO. 690, PUTIN'S RUSSIA: HOW SHOULD THE U.S. RESPOND? 12 (2000), available at <http://www.heritage.org/Research/RussiaandEurasia/HL690.cfm>.

<sup>197</sup> David R. Marples, *Kyiv and the Power Struggle in Crimea*, Stasiuk Program for the Study of Contemporary Ukraine, at <http://www.ualberta.ca/~cius/stasiuk/st-articles/an-crimea1.htm> (last visited Aug. 19, 2004).

<sup>198</sup> The conflict escalated with the fall of Azari President Abulfaz Elcibey and the rise to power of Heydar Aliyev. President Elcibey's downfall partly resulted from the government's failure to hold parliamentary elections. A referendum on August 29, 1993, confirmed the lack of public confidence in Elcibey and Aliyev won the presidential elections on October 3, 1993. Although human rights violations occurred during Elcibey's rule, under Aliyev, these violations increased in number and severity. For a history of the Nagorno-Karabakh Conflict, see Azerbaijan Embassy, Washington, D.C., *Background: Armenian-Azerbaijani Conflict* (2001), at [http://www.azer.com/aiweb/categories/karabakh/karabakh\\_current/keywest\\_background.html](http://www.azer.com/aiweb/categories/karabakh/karabakh_current/keywest_background.html).

<sup>199</sup> Despite some successes in the Karabakh war, the internal situation in Armenia was deteriorating. Reported voting irregularities and anti-opposition manipulations during the parliamentary and presidential election of 1996 resulted in the resignation of Armenian President Levon Ter-Petrosian in February 1998. The election of March 1998 was won by Prime Minister Robert Kocharian, a symbol of Armenian victories in the Karabakh war. See Elizabeth F. Defeis, *Armenia*, in 1 LEGAL SYSTEMS, *supra* note 164, at 79; see also *Elections in Armenia*, Sept. 26, 2004, at <http://www.electionworld.org/armenia.htm>; Robert Kocharian-Armenia's New President (BBC news broadcast, Mar. 31, 1998), at <http://news.bbc.co.uk/1/hi/world/analysis/72058.stm>; BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. STATE DEP'T, COUNTRY REPORT ON HUMAN RIGHTS PRACTICES-2001 (2002), available at <http://www.state.gov/g/drl/rls/nrpt/2001/eur/8221.htm>.

in Azerbaijan. The conflict resulted in widespread violations of human rights, the death of 30,000 people, and left more than a million without homes.<sup>200</sup>

In sum, the post-Soviet experiments with regionalization were chaotic and poorly organized. In contrast to the human rights movements in Latin America, post-Soviet regionalism did not have a grassroots character and reflected almost solely regional, and often parochial, ambitions of post-communist leaders, which clashed with the centrist policies of the federal government. Improvement of the human rights record of post-socialist countries requires changes to the political culture; it cannot be accomplished purely by political decisions. It requires communication between human rights groups from various regions and contacts with international human rights organizations. The study of internationalization of human rights movements in Latin America may provide some valuable lessons for the human rights activities in the post-Soviet states.

#### *D. Citizens' Rights and Rights Guaranteed to All Persons*

The dispute over the treatment of minorities usually arouses discussion concerning which rights should be reserved purely for citizens and which should be guaranteed to everyone. Taking a closer look at this issue, several observations must be made.

In both regions, the level of constitutional protection offered to citizens, foreigners, and residents is unequal. The differences do not follow regional boundaries, however, the approaches vary from state to state, reflecting internal problems with non-citizens visiting or living in the country and the economic potential of the state to extend equal treatment to every person. Direct references to foreigners' rights are meaningful as they may signify to what extent the state is ready to facilitate trade and foreign investment and to provide sufficient protection for foreign property.

Some constitutions clearly attempt to reduce the rights reserved solely to citizens to strictly political activities such as elections, assemblies, and governance of the state; other rights are guaranteed to everyone either by the principle of equality or by separate constitutional statements.<sup>201</sup> Other states,

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<sup>200</sup> Jonathan Ewing, *Armenia, Azerbaijan Spar Over Nagorno-Karabakh at U.N. General Assembly*, ASSOCIATED PRESS, Sept. 15, 2002.

<sup>201</sup> Several examples illustrate this approach. In Argentina, after decades of disputes over the state's taking of foreign property, constitutional guarantees of foreigners' rights became especially important. The Constitution clearly states:

Foreigners enjoy in the territory of the Nation all of the civil rights of citizen;



however, provide very few economic and social rights to non-citizens. In addition, some constitutions attempt to ease citizenship requirements<sup>202</sup> to meet the standards of international organizations and accommodate the needs of residents applying for citizenship, while other constitutions make the process of applying for citizenship lengthy and difficult.<sup>203</sup> Finally, some constitutions allow dual citizenship, while others ban it completely.<sup>204</sup>

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they may engage in their industry, trade or profession, own, purchase or transfer real property, navigate the rivers and coasts, freely practice their religion, [and] make wills and marry in accordance with the laws. They are not obligated to assume citizenship, or to pay extraordinary compulsory taxes. They may obtain naturalization by residing two continuous years in the Nation, but the authorities may shorten this term in favor of anyone so requesting, upon their asserting and proving services to the Republic.

ARG. CONST. art. 20, *translated in* 1 CONSTITUTIONS, *supra* note 5.

The Constitution of Brazil states: "Everyone is equal before the law, with no distinction whatsoever, guaranteeing to Brazilians and foreigners residing in the Country the inviolability of the rights to life, liberty, equality, security and property." BRAZ. CONST. art. 5, *translated in* 3 CONSTITUTIONS, *supra* note 5. The limitations to such rights are also listed.

<sup>202</sup> For example, the Estonian Law on Citizenship, which was based on the Law on Citizenship originally enacted in 1938 prior to the Soviet invasion, and reinstated on February 28, 1992, lists the requirements for attaining Estonian citizenship. Basically, the reenacted law denied the Russian-speaking minority automatic citizenship, as well as the right to vote. According to the law, Estonian citizenship was only granted to those who were citizens prior to June 16, 1940, their direct descendants, and those who "provide particular valuable service to the national defense or society of the Republic of Estonia or who are widely known for their talents, knowledge or work." COMM'N ON SEC. & COOPERATION EUR., HUMAN RIGHTS AND DEMOCRATIZATION IN ESTONIA (1993). The new Estonian Law on Citizenship was adopted by the Parliament on January 19, 1995, and proclaimed as law by the President of Estonia on January 31, 1995. Estonia eased its regulations and allowed descendants of stateless residents to become citizens. At that time, twenty-two percent of residents still did not have Estonian citizenship. ESTONIA ENCARTA ENCYCLOPEDIA, *available at* [http://encarta.msn.com/encyclopedia\\_76563693/Estonia.html#endads](http://encarta.msn.com/encyclopedia_76563693/Estonia.html#endads) (last visited Aug. 19, 2003).

<sup>203</sup> Although many of the Russian constitutional provisions have been copied into several constitutions of the new post-Soviet states, their approach to citizens' rights and rights guaranteed to all often differs from the Russian prototype. For example, the Baltic countries have substantial ethnic minorities that reduced the national population to sixty-four percent in Estonia and fifty-five percent in Latvia. Richard Rose, *Special Reports: Rights and Obligations of Individuals in the Baltic States*, 6 E. EUR. CONST. REV. 35, 35-43 (1997). The sizable minority population was primarily a result of the great number of Russian migrations to this region after World War II. Between the years 1945 and 1959, some 280,000 non-Estonians moved to Estonia, causing the percentage of Estonians to drop from ninety percent in 1934 to sixty-four percent in 1991. The migration increased the Russian minority to twenty-nine percent; the other seven percent consisted of Ukrainians, Belarusians, and Finns, and contributed to strict citizenship requirements in the Baltic republics. ENCARTA ENCYCLOPEDIA, *supra* note 202.

<sup>204</sup> For example, the Russian Constitution allows dual citizenship. RUSS. CONST. art. 62. The

The approach of the drafters of other constitutions is less transparent. In principle, they tried to follow the general tendency in modern constitutionalism to extend constitutional protections beyond the group of persons enjoying citizenship; in reality, they offered specific rights to only a narrow group. For example, the Colombian Constitution follows this pattern. The list of rights guaranteed to all persons is long, but the exceptions are sometimes surprising. For example, the drafters attempted to guarantee solely to citizens the right to dignity and the right to move within the territory of the country.<sup>205</sup> Peruvian constitutionalism also follows a mixed approach. The Constitution has a special chapter on political rights and obligations, which protects the rights of citizens.<sup>206</sup> Almost all other rights and freedoms are guaranteed to all persons; the articles on social and economic rights, however, guarantee relatively few rights.<sup>207</sup> These constitutional provisions have a declaratory character; their enforcement thus depends on the adoption of implementing laws or must be confirmed by court decisions.

The 1993 Russian Constitution follows the approach of Article 14 of the European Convention and the Fourteenth Amendment of the United States Constitution.<sup>208</sup> It guarantees the equality of all rights and liberties, and manifests its openness in a manner similar to the language used in the Ninth Amendment to the U.S. Constitution. The Russian act states, "The listing of the basic rights and freedoms in the Constitution of the Russian Federation

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Baltic constitutions, however, prohibit dual citizenship. *E.g.*, LITH. CONST. art. 12 (banning dual citizenship except for individual cases provided by law). Likewise, Armenia, Georgia, and Kyrgyzstan ban dual citizenship. ARM. CONST. art. 14; GEOR. CONST. art. 12, § 2; KYRG. CONST. art. 13, § 2. The constitutions of the Central Asian states, in contrast, do not clearly address the issue: for example, the Kazakhstan Constitution does not recognize, but does not clearly prohibit, dual citizenship. *See* KAZ. CONST. art. 10.

<sup>205</sup> The 1991 Colombian Constitution states: "Any Colombian citizen, except for the limitations established by law, has the right to move about freely across the national territory, to enter and exit the country, and to remain and reside in Colombia." COLOM. CONST. art. 24, *translated in* 4 CONSTITUTIONS, *supra* note 5. Article 51 further guarantees, "All Colombian citizens are entitled to live in dignity." *Id.* art. 51.

<sup>206</sup> PERU CONST. tit. I, ch. III.

<sup>207</sup> *Id.* tit. I, ch. II.

<sup>208</sup> *See generally* Sandra Fredman, *Equality Issues*, in THE IMPACT OF THE HUMAN RIGHTS BILL ON ENGLISH LAW 111, 112 (Basil S. Markesinis ed., 1998). Article 14 of the European Convention reads: "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination." European Convention on Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 14, 213 U.N.T.S. 221, 232 [hereinafter ECHR]. The Fourteenth Amendment of the U.S. Constitution provides, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

shall not be interpreted as a denial or diminution of the other commonly recognized rights and freedoms of man and citizens."<sup>209</sup> Like several Latin American constitutions, the Russian Constitution emphasized the equality of citizens' and foreigners' rights.<sup>210</sup> The Constitution adopts a broad definition of equality, restricted only by the principle of "equal freedom," which prohibits the violation of the same rights of another person.<sup>211</sup> More specifically, it prohibits unequal treatment based on some disqualified and enumerated grounds, such as sex, race, nationality, language, origin, property, employment status, residence, religion, convictions, and membership in associations.<sup>212</sup> The list of prohibited grounds of discrimination is not finite as the Constitution also refers to "any other circumstances" in which discrimination is prohibited.<sup>213</sup> The provision reserving the right to own land only to citizens,<sup>214</sup> although not unusual for new democracies,<sup>215</sup> seems to undermine the state commitments to the principles of a market economy.

The level of constitutionalization of rights of ethnic minorities and non-citizens in the states of the South Caucasus varies as well. For example, the Georgian Constitution refers to minorities only briefly in Article 38, § 2, and then in a restrictive rather than protective tone. Article 38, § 2 states, "[t]he exercise of minority rights shall not oppose the sovereignty, state structure, territorial integrity, and political independence of Georgia." The Constitution of Armenia guarantees national minorities only the right to preserve their traditions and to develop their language and culture.<sup>216</sup> Both countries grant a great number of important rights only to citizens. However, the drafters of the Azerbaijani Constitution came closer to the Russian approach. The list of rights and freedoms guaranteed to all persons is long and includes rights frequently guaranteed only to citizens, such as the right to education, social rights, as well as the right to assemble, associate, and strike.<sup>217</sup> The rights of citizens in Azerbaijan are clearly limited to political participatory activities.

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<sup>209</sup> RUSS. CONST. art. 55, § 1, *translated in 15 CONSTITUTIONS*, *supra* note 5.

<sup>210</sup> *Id.* art. 62, § 3 ("Foreign citizens and stateless persons shall enjoy in the Russian Federation the rights of its citizens and bear their duties with the exception of cases specified by the federal law or international treaty of the Russian Federation.").

<sup>211</sup> *E.g.*, *id.* art. 36, § 2.

<sup>212</sup> *See id.* art. 19, § 2.

<sup>213</sup> *Id.*

<sup>214</sup> *Id.* art. 36, § 1.

<sup>215</sup> *See e.g.*, LITH. CONST. art. 47.

<sup>216</sup> ARM. CONST. art. 37.

<sup>217</sup> AZER. CONST. arts. 36, 42, 49, 58.

Similar to the Azari approach, the list of rights reserved by Tajik Constitution to citizens is exceptionally short. The Constitution grants citizens exclusive rights only with regard to voting, choice of place of residence, and the right of assembly.<sup>218</sup> Generally, all other rights, including controversial social benefits, such as the right to work, housing, leisure, health care, education, and social security, are granted to "everyone."<sup>219</sup> The Constitution of Kazakhstan states that foreigners and stateless persons have the same rights, freedoms, and responsibilities as citizens. The focus of the Kazakh act, nevertheless is on citizens. They cannot be deprived of citizenship, they have the right to change citizenship, and they cannot be exiled.<sup>220</sup> Further, they cannot be extradited except when extradition is provided in international treaties.<sup>221</sup>

### *E. Gender Discrimination and Affirmative Action*

The main international human rights documents do not clearly support affirmative action. Article 26 of the International Covenant on Civil and Political Rights simply confirms that "all persons are equal before the law" and condemns discrimination on any ground.<sup>222</sup> Article 14 of the European Convention sets up the right of equal treatment as a derivative right; only the rights listed in the Convention are guaranteed without discrimination.<sup>223</sup> Article 24 of the American Convention on Human Rights is very short and states only that, "[a]ll persons are equal before the law."<sup>224</sup> Consequently, they are entitled, without discrimination, to equal protection of the law. The Convention on the Elimination of All Forms of Discrimination Against Women goes further. Article 4 states, "[s]pecial measures aimed at accelerating *de facto* equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards . . . ."<sup>225</sup>

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<sup>218</sup> TAJ. CONST. arts. 24, 27, 28.

<sup>219</sup> *Id.* art. 12, § 4.

<sup>220</sup> KAZ. CONST. art. 10, § 2. Except when provided in international treaties. *Id.* art. 11, § 1.

<sup>221</sup> *Id.* art. 11, § 1.

<sup>222</sup> International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, art. 26, 999 U.N.T.S. 171, 179 (*entered into force* Mar. 23, 1976) [hereinafter ICCPR].

<sup>223</sup> ECHR, *supra* note 208; *see also* Fredman, *supra* note 208, at 111-12.

<sup>224</sup> American Convention on Human Rights, *opened for signature* Nov. 22, 1969, art. 24, 1144 U.N.T.S. 123, 151 [hereinafter ACHR].

<sup>225</sup> Convention on the Elimination of all Forms of Discrimination Against Women, *opened*

Although the concept of affirmative action still remains controversial,<sup>226</sup> several Latin American states recognized that the elimination of *de facto* gender discrimination is a condition *sine qua non* of the process of creating a civic society. Sporadic legislative initiatives legalizing affirmative action can be found in the post-Soviet states as well.

The participation of women in the politics of Latin American countries is well documented. In Argentina, President Peron's second wife, Eva Duarte de Peron, was the charismatic nexus between Peron and the workers. In addition, she helped him gain the support of women and assisted in giving women the right to vote.<sup>227</sup> In 1955, President Peron was ousted by a military coup and forced into exile,<sup>228</sup> but when he was reelected on September 23, 1973, his third wife, Maria Estela Isabel Martinez de Peron, became vice president.<sup>229</sup> Upon Peron's death on July 1, 1974, his widow succeeded him in office,<sup>230</sup> confirming the acceptance of women's presence in the country's politics. Other countries followed suit.<sup>231</sup> Women also led the way in grassroots movements by forming human rights-oriented organizations.

[Women] were disproportionately active in groups such as COPACHI [Committee for Cooperation for Peace in Chili], FASIC [Foundation for Social Help of the Christian Churches], the Vicariate, and relatives' associations. The time had come for women at the grassroots level to call attention to the double oppression (as women and the lower class) within the country."<sup>232</sup>

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for signature Dec. 18, 1979, 1249 U.N.T.S. 13, 16 (entered into force Sept. 3, 1981).

<sup>226</sup> For example, in 1995, the European Court of Justice ruled that the preferential treatment of women in the competition for public offices in Germany violates the European Union's standards of equality. Manfred Novak, *Civil and Political Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS, *supra* note 89, at 100 (quoting the European Court of Justice case *Kalanke v. Bremen* decided on October 17, 1995).

<sup>227</sup> A law extending suffrage to women was adopted in 1947, and in the 1951 elections, the Peronist Party included thirty female candidates for parliamentary seats. See Eve R. Ladmann, in 1 WORLD ENCYCLOPEDIA OF PARLIAMENTS AND LEGISLATURES 16 (George T. Kurian ed., 1998).

<sup>228</sup> Jonathan M. Miller, *Introductory Notes: Constitutional History and Political Background to Argentina*, in 1 CONSTITUTIONS, *supra* note 5, at vii, ix.

<sup>229</sup> *Id.* at x.

<sup>230</sup> *Id.*

<sup>231</sup> See, e.g., CLEARY, *supra* note 36, at 48. In Chile, after Pinochet came to power in 1973, his wife, Lucia Hiriart, became a director of several important institutions for the protection of women's rights, including the Mothers' Centers and National Secretariat for Women. *Id.*

<sup>232</sup> *Id.* at 13.

The activity of women contributed to the constitutionalization of affirmative action in some of the Latin American constitutions. For example, in Colombia, with a high level of reported violations of rights of women,<sup>233</sup> children, the indigenous population, and minorities,<sup>234</sup> the elimination of *de facto* gender, racial, and ethnic discrimination has been recognized as a condition *sine qua non* of the process of creating a civic society. The drafters of the Colombian Constitution seemed to understand the importance of this issue and constitutionalized affirmative action as a necessary instrument of the “real and effective” protection of disadvantaged groups.<sup>235</sup> The Constitution guarantees equal rights to men and women and confirms that “[w]omen cannot be subjected to any type of discrimination.”<sup>236</sup>

In Argentina, the Constitution also confirms that equality of opportunities for men and women “shall be guaranteed through affirmative actions in the

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<sup>233</sup> See *Organization Feminina Popular Threatened Again*, Feb. 1, 2003, at <http://www.colombiasupport.net/cantagallo.html>. There were numerous cases of reported threats by paramilitary organizations against leaders of the women’s movement. *Id.*; see also Gaby Oré-Aguilar, *Sexual Harassment and Human Rights in Latin America*, 66 *FORDHAM L. REV.* 631 (1997) (providing an extensive discussion of sexual harassment in Latin America).

<sup>234</sup> The U.S. State Department reported:

Violence and extensive societal discrimination against women, abuse of children, and child prostitution are serious problems. Extensive societal discrimination against indigenous people and minorities continued. Labor leaders and activists continued to be targets of high levels of violence. Child labor is a widespread problem. Trafficking in women and girls for the purpose of sexual exploitation is a problem. ‘Social cleansing’ killings of street children, prostitutes, homosexuals, and others deemed socially undesirable by paramilitary groups, guerrillas, and vigilante groups continued to be serious problems.

BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEP’T, *Colombia, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2001* (2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8318.htm>.

<sup>235</sup> Although the Colombian Constitution does not single out women for special protection, it states:

The state will promote the conditions so that equality may be real and effective and will adopt measures in favor of groups which are discriminated against or marginalized.

The state will especially protect those individuals who on account of their economic, physical, or mental condition are in obviously vulnerable circumstances and will sanction the abuses or ill-treatment perpetrated against them.

COLOM. CONST. art. 13, *translated in 4 CONSTITUTIONS, supra* note 5.

<sup>236</sup> *Id.* art. 43.

regulation of political parties and in the electoral system."<sup>237</sup> A 1991 law already mandated the use of gender quotas by all political parties in national elections and an implementing decree in 1993 confirmed the requirement "that a minimum of thirty percent of all political party lists of candidates be female."<sup>238</sup> The Brazilian Constitution guarantees specific incentives for women in order to help them compete in the job market.<sup>239</sup> In Paraguay, the Constitution confirms the equality of rights but recognizes that "[t]he State will create conditions conducive to, and create adequate mechanisms for, making this *equality true and effective* by removing those obstacles that could prevent or curtail this equality as well as by promoting women's participation in every sector of national life."<sup>240</sup>

In the post-Soviet republics, the commentators observed the *de facto* decreased participation of women in political life in comparison to their activities in socialist parliaments.<sup>241</sup> Although politically oppressive, communist doctrine incorporated the concept of full equality regardless of any gender factors. Although democratization in the last decade of the twentieth century brought progress in many areas of life, it nevertheless frequently marginalized women. The number of poor women increased considerably in comparison with the number of poor men; their pauperization risk became

<sup>237</sup> ARG. CONST. art. 27, *translated in* 1 CONSTITUTIONS, *supra* note 5.

<sup>238</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS & LABOR, U.S. STATE DEP'T, *Argentina, in* COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2001 (2002), <http://www.state.gov/g/drl/rls/hrrpt/2001/wha/8278.htm>.

As a result, the presence of women in Congress has increased. The number of female members in the Lower House rose from seventy-one to seventy-five (out of 257 total members) after the October 14th national legislative elections. Until the October 14th elections, gender quotas had not applied in the Senate, where there were only two female members in the seventy-two-person body. However, a December 2000 presidential decree mandated that at least one-third of all senatorial candidates in future elections must be women. There are twenty-five women in the Senate that took office in December. For most of the year, there was one female cabinet-level official—the Minister of Labor, Employment, and Human Resources Training. There are no female justices on the Supreme Court although women are prominent in lower levels of the judiciary system.

*Id.*

<sup>239</sup> BRAZ. CONST. art. 7, § XX.

<sup>240</sup> PARA. CONST. art. 48, *translated in* 14 CONSTITUTIONS, *supra* note 5 (emphasis added).

<sup>241</sup> See data collected by Barbara Einhorn, *Concepts of Women's Rights, in* PRIVATIZATION AND DEMOCRATIZATION IN CENTRAL AND EASTERN EUROPE AND THE SOVIET UNION: THE GENDER DIMENSION 63 (Valentine M. Moghadam ed., 1992); *see also* Katarina Tomasevski, *Women's Rights, in* HUMAN RIGHTS: CONCEPT AND STANDARDS, *supra* note 89, at 231.

larger, especially in rural localities. This problem often resulted in increased control of women by social communities and dramatically decreased political activity in comparison to their activities in previous socialist parliaments.<sup>242</sup> The human rights reports on the situation in Central Asia, and even in the European countries of the former Soviet Union,<sup>243</sup> confirm that despite constitutional protection, traditional societal discrimination against women continues to be significant. Trafficking in women and girls for the purposes of prostitution is still a highly used practice and women are discriminated against in workplaces.

Under the pressure of non-governmental organizations (NGOs) and international human rights monitoring organizations, some post-socialist states recognized the necessity of special protection for women. For example, in the late twentieth century, Kazakhstan's government issued several decrees to increase the role and participation of women in social and political life, to promise better health protection and to prevent violence against women in their private lives.<sup>244</sup> The Armenian Electoral Code offered a concrete program to

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<sup>242</sup> In 2001, the U.S. State Department reported on the situation in Turkmenistan: The percentage of women in government and politics does not correspond to their percentage in the population, although there are no legal restrictions on the participation of women in the political process. Thirteen members of the fifty-member Mejlis are female. Women serve in the following positions: Deputy Chairman for Economy and Finance; Prosecutor General; Ambassador to the U.N.; Chief of Presidential Protocol; Head of the Mejlis (Parliamentary) Committee on Science, Education, and Culture; Deputy Minister for Economy and Finance; and Deputy Minister for Social Protection. No women serve as provincial governors (Hakims); however, the position of deputy Hakim often is given to a woman.

BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEP'T, *Turkmenistan*, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2001 (2002), available at <http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8359.htm>.

<sup>243</sup> In Moldova, sixty-five percent of women are unemployed. The trafficking of women involved in prostitution has increased in the last decade, reaching levels alarming to the International Organization for Migration and the International Organization of Labor. The number of women participating in active political life is also alarmingly low; in 1998, there was one woman in the government and nine female deputies. The representative figures for 2001 are no women in the government and eleven in the parliament. United Nations Division for the Advancement of Women (DAW), Replies to Questionnaire on the Implementation of the Beijing Platform for Action, at <http://www.un.org/womenwatch/daw/followup/responses/Moldova.htm> (last visited Jan. 13, 2005).

<sup>244</sup> See Government Decree No. 999 on the National Plan of Action to Improve the Situation of Women in the Republic of Kazakhstan (Text No. 311), at 94-155 (*Aktiler Zhinagy*, 1999-09-00. No. 35, July 19, 1999); Presidential Decree on the Presidency of the Republic National



reserve at least five percent of candidate seats on the party lists for women.<sup>245</sup> Some states promised elaborate protections to pregnant women and single mothers working and raising children.<sup>246</sup> Nevertheless, most of these actions were taken at the sub-statutory level and did not create an effective legal framework of protection enforceable in the constitutional courts. The improvement of the system of protection of human rights still remains one of the priorities of the region. This fact must be recognized by legislative bodies and combined with educational programs, especially in rural areas and among refugee women. These programs would enable the elimination of the approach focusing on the rights of heads of families, without providing adequate protection for women and children. Without the constitutionalization of affirmative action and the development of grassroots movements to supplement the constitutionalization, the post-Soviet countries will lag behind countries in the Latin American region.

## V. CONSTITUTIONALIZATION OF RIGHTS AND FREEDOMS IN COMPARATIVE PERSPECTIVE

### *A. Civil and Political Rights*

Most of the constitutions of both regions guarantee the principal civil and political rights.<sup>247</sup> The tendency to adhere to international standards resulted in numerous similarities in the constitutional protection of these rights. In order to avoid unnecessary repetition, this part of the article attempts to expose the more striking differences in approaches to civil and political rights protection. The examples illustrate some trends rather than exhaustively analyze all the countries' bills of rights.

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Committee for Matters Concerning Family and Women (Text No. 425), at 54-58 (*Aktiler Zhinagy*, 1998-12-00. No. 48); Instruction No. 3395 on the Fundamentals of State Policy to Improve Women's Situation (Text No. 74), pp. 51-62 (*Aktiler Zhinagy*, 1997-04-00. No. 11, Mar. 5, 1997).

<sup>245</sup> Electoral Code art. 100(2) (Arm.).

<sup>246</sup> Labor Code ch. XV (Kyrg.).

<sup>247</sup> There are a few exceptions. For example, it has to be noted that the Constitution of Argentina does not have any separate cluster of articles covering substantive personal rights. It does not address directly the right to dignity or life and refers to capital punishment only occasionally, when it prohibits the penalty of death for political offenses. ARG. CONST. art. 18.

### 1. Dignity

The most important international human rights documents do not define dignity or address the issue of its individual or collective character.<sup>248</sup> Following a more liberal standpoint, they recognize that dignity is an inherent feature of the human person. According to this liberal perspective, dignity adheres to individuals due to the fact that they are human and their group membership is irrelevant.<sup>249</sup> Most constitutions follow this pattern and recognize dignity as one of the crucial personal freedoms, and some deduce from this right the general prohibition against torture and inhuman or degrading treatment or punishment.<sup>250</sup> Very few constitutions place dignity at the top of personal substantive rights as a value most fundamental to individual identity. For example, the 1997 Polish Constitution states that human dignity is the source of all freedoms and rights<sup>251</sup> and the Peruvian Constitution singles out dignity and defense of the human person as the supreme goals of the state.<sup>252</sup> Most of the other constitutions in both regions simply prohibit any discrimination against human dignity and guarantee this right to all persons. Interestingly, however, the Constitution of Turkmenistan grants the right to dignity only to citizens.<sup>253</sup> Generally, the word "dignity" with regard to children, workers, and older people is more often used in the Latin American constitutions than in the constitutions of the post-Soviet states.<sup>254</sup> However,

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<sup>248</sup> The Preamble of the Charter of the United Nations declares: "We the Peoples of the United Nations [are] determined to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small." U.N. CHARTER pmbl. The Universal Declaration of Human Rights states, "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., art. 3, U.N. Doc. A/810 (1948) [hereinafter UDHR]. The Preambles of the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights recognize that "the equal and inalienable rights of all members of the human family . . . derive from the inherent dignity of the human person." See, e.g., ICCPR, *supra* note 222, pmbl.

The Preambles of the International Covenant on Economic, Social, and Cultural Rights and the International Covenant on Civil and Political Rights recognize that these rights "derive from the inherent dignity of the human person."

<sup>249</sup> See DONNELLY, *supra* note 91, at 27.

<sup>250</sup> See, e.g., ARM. CONST. art. 19; KAZ. CONST. art. 17.

<sup>251</sup> POL. CONST. art. 30.

<sup>252</sup> PERU CONST. art. 1. This article has been separated from the lengthy Article 2, which lists the other rights of all persons. *Id.* art. 2.

<sup>253</sup> TURKM. CONST. art. 40.

<sup>254</sup> There are eight references to this right in the 1991 Constitution of Colombia. See, e.g.,

despite the problems with the protection of indigenous persons' identities in Latin America and discussions of their right to collective dignity,<sup>255</sup> this concept has not yet received a firm foothold in the constitutions of the region.

## 2. Right to Life

The Constitutional provisions on the right to life generally repeat the fundamental declarations of the major international human rights documents.<sup>256</sup> These acts recognize the fundamental value of human life and ban the arbitrary or intentional deprivation of life or summary execution,<sup>257</sup> without prohibiting the deprivation of life *in toto*. The adoption of additional protocols, such as the 1983 Protocol No. 6 to the 1950 European Convention of Human Rights, the Second Optional Protocol to the International Covenant on Civil and Political Rights of 1989, and the Protocol to the American Convention on Human Rights of 1990, evidence, however, the well-recognized trend in international human rights law to abolish the death penalty.<sup>258</sup> These protocols have been signed and ratified by several post-Soviet states and Latin American states. The implementation of these international commitments warrants several observations.

In Latin America, the constitutionalization of the abolishment of capital punishment has been slow and only a group countries incorporated a ban on the death penalty into their constitutions promptly after signing the protocols.<sup>259</sup> The bills of rights usually present lists of the most severe crimes still penalized by capital punishment.<sup>260</sup> The drafters of most of the constitu-

COLOM. CONST. arts. 1, 2, 21, 42, 51, 53, 68, 70; BRAZ. CONST. arts. 1, 42, 170, 226, 227, 230.

<sup>255</sup> Rhoda Howard wrote: "Many indigenous groups (that is, the remnants of precapitalist societies destroyed—physically, culturally, or both—during the process of European conquest and/or settlement) now make claims for the recognition of their collective or communal rights." Howard, *supra* note 180, at 399.

<sup>256</sup> See UDHR, *supra* note 248, art. 3; ECHR, *supra* note 208, art. 2, § 1; ACHR, *supra* note 224, art. 4.

<sup>257</sup> See Novak, *supra* note 226, at 75-78 (commenting on numerous cases of violations of the right to life established by the Inter-American Commission on Human Rights and by the European Court of Human Rights).

<sup>258</sup> See Michael Marshall, *Death Penalty Should Be Narrowed to Fewer Crimes, Bonnie Says*, Univ. of Virginia School of Law, [http://www.law.virginia.edu/home2002/html/news/2004\\_spr/bonnie\\_dp.htm](http://www.law.virginia.edu/home2002/html/news/2004_spr/bonnie_dp.htm) (posted Mar. 5, 2004).

<sup>259</sup> The ban against capital punishment has been constitutionalized (with the exception of wartime punishment) by Brazil, BRAZ. CONST. art. 5, § XLVII(a), Colombia, COLOM. CONST. art. 11, and Puerto Rico, P.R. CONST. art. II, § 7.

<sup>260</sup> See, e.g., PERU CONST. art. 140, translated in 14 CONSTITUTIONS, *supra* note 5 ("The

tions do not explain what the right to life entails and refer instead to the standard limitations recognized by international conventions.<sup>261</sup> Most constitutional drafters leave the more detailed explanation of the state's approach to fundamental issues, such as the death penalty, conception of human life, or euthanasia, to the statutory laws and the courts.<sup>262</sup>

The process of constitutionalizing the abolishment of capital punishment in the countries of the former Soviet Union was equally disappointing. Several new constitutions merely have short statements confirming that "[t]he right to life of individuals shall be protected by law."<sup>263</sup> They guarantee the right to life to "all persons"; however, some are inconsistent in the protection they offer.<sup>264</sup>

Most drafters of the bills of rights incorporated the Russian formula,<sup>265</sup> which states that the death penalty is applied "exceptionally" and "until its abolition" for especially grave crimes against life.<sup>266</sup> It was widely expected that after Russia's accession to the Council of Europe, capital punishment would be eliminated in the country. In fact, Yeltsin's decree in 1996 suspended executions, but the parliament refused to take any more decisive position on the issue. As a result, the Russian Constitutional Court ruled on

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death sentence may only be applied for the crime of treason to the fatherland in wartime and for terrorism, in accordance with the laws and treaties obligating Peru."); MEX. CONST. art. 22, *translated in* 12 CONSTITUTIONS, *supra* note 5 (providing a list of crimes for which capital punishment may be imposed: "high treason committed during a foreign war, parricide, murder that is treacherous, premeditated, or committed for profit, arson, abduction, highway robbery, piracy, and grave military offenses").

<sup>261</sup> Constitutionalization of exceptions to the inviolable right to life is rather rare. *See, e.g.*, AZER. CONST. art. 27, § III.

<sup>262</sup> Some exceptions have to be noted. *See, e.g.*, GUAT. CONST. art. 3 (recognizing the right to life from the moment of conception); EL SAL. CONST. art. 1 (amended Jan. 1999) (protecting the right to life from the moment of conception). Abortion is strictly prohibited in El Salvador. The law criminalizes abortion in all circumstances, even to save a woman's life or in cases of rape or incest. Both abortion-providers and the women are subject to prison terms up to twelve years. *See Severe Abortion Law in El Salvador Persecutes Women*, Center for Reproductive Rights (Nov. 30, 2001), available at [http://www.crlp.org/pr\\_01\\_1130salvador.html](http://www.crlp.org/pr_01_1130salvador.html).

<sup>263</sup> LITH. CONST. art. 19, *translated in* 11 CONSTITUTIONS, *supra* note 5.

<sup>264</sup> For example, the Constitution of Azerbaijan declares that "everyone has the right to life," but later states that "every citizen's right to life is inviolable." AZER. CONST. art. 27, §§ 1, 2.

<sup>265</sup> *See, e.g.*, ARM. CONST. art. 17 (stating that the death penalty may be prescribed by law as an exceptional punishment).

<sup>266</sup> RUSS. CONST. art. 20, § 2; *see also* ARM. CONST. art. 17; GEOR. CONST. art. 15, § 2; KAZ. CONST. art. 15, § 1; TURKM. CONST. art. 20 (stressing that the death penalty is an exceptional punishment but not declaring its temporary character).

February 2, 1999, that the courts could not impose or enforce death sentences until the adoption of a new law limiting capital punishment to jury cases.<sup>267</sup>

In other countries, the courts also attempted to speed up implementation of the ban on capital punishment. On December 29, 1999, the Constitutional Court of Ukraine ruled that the provisions of the Criminal Code of Ukraine, which provided for the death penalty, were unconstitutional.<sup>268</sup> According to the Law of Ukraine of February 22, 2000 (On the Introduction of Amendments to the Criminal, Criminal Procedure and Correctional Labour Codes of Ukraine), the Criminal Code of Ukraine has been brought into conformity with 1999 ruling of the Constitutional Court.<sup>269</sup> The death penalty was replaced by life imprisonment with one exception.<sup>270</sup>

### 3. *Personal Liberty and Related Rights*

Manfred Novak wrote:

Personal liberty is one of the oldest human rights already to be found in the British *Magna Carta Libertatum* of 1215. Its meaning must not be confused with that of liberty in a general sense. Liberty of the person relates only to the freedom of bodily movement in the narrowest sense, that is to the freedom from forcible detention of a person at a certain, narrowly bounded location, such as a prison, police detention centre, psychiatric hospital, concentration camp or a detoxification facility for alcoholics or drug addicts.<sup>271</sup>

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<sup>267</sup> HERMAN SCHWARTZ, *THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE* 158 (2000).

<sup>268</sup> Similar decisions were issued by the Constitutional Court of Albania in December 1999 and the Constitutional Court of Lithuania in December 1998. See *Constitution Watch: A Country-by-Country Update on Constitutional Politics in Eastern Europe and the Ex-USSR*, 8 E. EUR. CONST. REV. 2, 2, 23 (1999).

<sup>269</sup> Communication Contained in a Letter from the Permanent Representative of Ukraine (June 29, 2000) (listing Ukraine's declarations to Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty), available at <http://conventions.coe.int/Treaty/EN/cadeprincipal.htm>.

<sup>270</sup> *Id.* The Law of Ukraine "On the Ratification of Protocol 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, of 1983" provides for retention of the death penalty for offenses committed in time of war by the introduction of appropriate amendments to statutory law. *Id.*

<sup>271</sup> Novak, *supra* note 226, at 81.

Protection of personal liberty requires the establishment of procedural guarantees and minimum standards against arbitrary arrest and detention.<sup>272</sup> The Universal Declaration of Human Rights confirms each person's right to liberty and security.<sup>273</sup> More elaborately, the International Covenant on Civil and Political Rights prohibits arbitrary arrest and detention.<sup>274</sup> The Covenant also lists several main principles on detention and imprisonment, such as the requirement of established legal procedures for the deprivation of freedom, including communication to the arrested or detained person of information about the reasons for arrest and eventual charges; prompt confrontation with judicial authorities; recognition of the right to trial in a reasonable period of time; recognition that detention pending trial is the exception rather than the rule; the right of the arrested or detained person to counsel, interpreter, or translator; notification of the family; prohibition of compelled confessions; and the humane treatment of persons deprived of liberty.<sup>275</sup>

The European Convention provides a long list of prerequisites to the legal deprivation of liberty.<sup>276</sup> It requires, among other things, the reasons and conditions of pre-trial detention, the boundaries of a speedy trial, communication with arrested persons, and the right of the individual subjected to unlawful arrest or detention to compensation.<sup>277</sup> Most of these standard requirements can also be found in the American Convention on Human Rights, which provides an elaborate list of prerequisites to the legal deprivation of liberty.<sup>278</sup> The American Convention requires state signatories to establish the conditions of permissible deprivation of liberty in their constitutions and to adopt laws pursuant to those provisions.<sup>279</sup>

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<sup>272</sup> *Id.* at 82.

<sup>273</sup> UDHR, *supra* note 248, art. 3.

<sup>274</sup> ICCPR, *supra* note 222, art. 9.

<sup>275</sup> See U.N. HIGH COMM'R FOR HUMAN RIGHTS, CENTRE FOR HUMAN RIGHTS, INTERNATIONAL HUMAN RIGHTS STANDARDS FOR LAW ENFORCEMENT 6-9 (1996) (providing a more detailed list of the basic principles).

<sup>276</sup> ECHR, *supra* note 208, art. 5.

<sup>277</sup> See Novak, *supra* note 226, at 81-83 (examining the minimum standards of deprivation of liberty set up by international human rights documents).

<sup>278</sup> ACHR, *supra* note 224, arts. 7, 8.

<sup>279</sup> On the basis of these acts, the UN High Commissioner for Human Rights prepared a list of principles which helps to determine the lawfulness of an arrest or detention. The principles include information at the time of arrest of the reason for the deprivation of freedom and of the charges against the arrested or detained person, prompt confrontation with judicial authorities, the right to be released if the detention is unlawful, the right to timely trial or release, the right to a lawyer and/or an interpreter, and the opportunity to communicate with a legal representative concerning the details on the record of the arrest, the right of the detainee to be given an

The priority for the drafters of the post-Soviet constitutions was to incorporate the general requirements of the European Convention into their countries' bills of rights; they differed, however, regarding the regulation of temporary preventive detention and pre-trial arrest, access to the courts' files, and constitutionalization of the right to legal assistance. The terms of preventive detention vary from forty-eight to seventy-two hours and in some countries unlawful arrest must be compensated.<sup>280</sup>

The Constitution of Turkmenistan differs from other post-Soviet constitutions in that it only guarantees personal liberty to citizens. The Constitution allows prosecutors and even unspecified "governmental organs" to temporarily detain citizens in circumstances prescribed by law.<sup>281</sup> This provision makes the constitutionalization of the *habeas corpus* right meaningless. This right loses its significance if the Constitution allows statutory laws to define urgent situations in which citizens may be detained without a court order or allows

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opportunity to familiarize himself with this record, the right to notify the family, and the right not to be forced to confess or testify against himself. See INTERNATIONAL HUMAN RIGHTS STANDARDS FOR LAW ENFORCEMENT, *supra* note 275, at 7.

<sup>280</sup> For example, the Russian Constitution states that a detainee must promptly (within forty-eight hours) be brought before a court, which will either confirm the validity of the arrest or release the detained individual. RUSS. CONST. art. 22. The Ukrainian Constitution requires a court order for an arrest and limits the time for the court's verification of a temporary preventive detention to seventy-two hours. UKR. CONST. art. 29. The Constitution requires immediate notification of the relatives of the arrested person concerning the reasons for the deprivation of freedom and the initiation of the criminal proceeding, and confirms the right of the arrested person to legal assistance. *Id.* The Moldovan Constitution requires that searches, arrests, and detentions be in accordance with the law, and limits a temporary preventive detention to a maximum of twenty-four hours and a pre-trial arrest to thirty days. MOLD. CONST. art. 25.

The Azerbaijani Constitution requires only immediate notification of the arrested person concerning the reasons for the deprivation of freedom and the initiation of the criminal proceeding. AZER. CONST. art. 67. The Georgian Constitution is slightly more detailed. It declares the general principle of inviolability of personal freedom, and states that a person detained must promptly (within forty-eight hours) be brought before a court that will either confirm the validity of arrest or release the detained individual. GEOR. CONST. art. 18. The term of detention should not exceed seventy-two hours before indictment and the imprisonment cannot last longer than nine months before the court makes a decision on the case. *Id.* In addition, unlawful arrest must be compensated. *Id.* Such provisions are, however, almost entirely missing in the Armenian Constitution. Compare *id.*, with ARM. CONST. art. 18. Given Armenia's reported record of arbitrary arrests and cases in which the police imprison detainees without notifying their family, the weak constitutional guarantees for liberty and security of the person are disappointed. See BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEPT., *Armenia, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2002* (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18351.htm>.

<sup>281</sup> TURKM. CONST. art. 21.

detentions on the basis of a prosecutor's decision without a clear requirement of a court's approval.

The Latin American states' record of the constitutionalization of the right to personal liberty is equally uneven. Evaluated against international standards, the provisions of many constitutions of this region are chaotic and not elaborate enough. Some of them give an archaic impression in comparison with the newly adopted post-Soviet bills of rights. For example, the Argentinean Constitution guarantees only the authorization of an arrest by a competent authority<sup>282</sup> and the proper conditions of the prisons, which *per se* cannot be used as instruments of punishment.<sup>283</sup> The Constitution of Colombia, in several provisions dispersed chaotically among many articles of Chapter I (Fundamental Rights), confirms basic *habeas corpus* rights.<sup>284</sup> The Peruvian Constitution is more elaborate: it pronounces the right of *habeas corpus*<sup>285</sup> and constitutionalizes certain minimum conditions for the lawful deprivation of liberty,<sup>286</sup> but surprisingly allows statutory laws to permit additional restrictions.<sup>287</sup> The Brazilian Constitution provides that, with the exception of an arrest *in flagrante delicto* military offenses or specific military crimes as defined in law, no one can be arrested without a written and justified order of a competent judicial authority.<sup>288</sup> The Constitution requires immediate notification of the family concerning the place where the arrested person is being held and an explanation to the arrested person of his rights.<sup>289</sup>

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<sup>282</sup> ARG. CONST. art. 18. The Constitution does not precisely state that this "authority" must function as a judicial organ. See *id.*

<sup>283</sup> *Id.*

<sup>284</sup> See, e.g., COLOM. CONST., translated in 4 CONSTITUTIONS, *supra* note 5 (guaranteeing that "[e]very individual is free"); *id.* art. 12 (stating that "[n]o one will be subjected to forced sequestration, torture, cruel, inhuman, or degrading treatment or punishment"); *id.* art. 17 (prohibiting slavery, servitude, and the slave trade).

<sup>285</sup> PERU CONST. art. 200, § 1.

<sup>286</sup> *Id.* art. 2, § 24.

<sup>287</sup> The Constitution guarantees that no one may be detained without a judge's order except when captured by the police *in flagrante delicto*. *Id.* art. 2, § 24(f). Aside from cases of terrorism, espionage, and drug trafficking, when the police may (for preventive reasons) detain persons for fifteen days, the detainee must be presented to the judge within twenty-four hours or at the end of the time allowed for the distance traveled. *Id.* The Constitution prohibits solitary confinement and imposes an obligation on the detaining authority to notify the family of the detainee without delay and in writing identifying the place of detention. *Id.* art. 2, § 24(g). Furthermore, it prohibits torture, violence, cruel or humiliating treatment, and makes statements obtained by force illegal. *Id.*

<sup>288</sup> BRAZ. CONST. art. 5, § XI.

<sup>289</sup> *Id.* art. 5, §§ LXII-LXIII. Additionally, the Constitution states:



#### 4. Due Process Rights

The approach of the drafters of the constitutions in both regions differs also with regard to the constitutionalization of the most seminal principles of the Western doctrine of due process. Some of them, such as the right to access the courts in all civil and criminal cases,<sup>290</sup> presumption of innocence, and the right to counsel are guaranteed by most of the constitutions.<sup>291</sup> Several other rights, such as the right to appeal, the principle of double jeopardy, the right to a public trial, the right not to be tried in default, the necessity of proof beyond a reasonable doubt, and the poisonous tree doctrine are not commonly constitutionalized.<sup>292</sup> Some of the constitutions clearly recognize that the courts should apply a lesser penalty if the penalization of the act was reduced after its commission, while others disqualify this approach.<sup>293</sup> The constitu-

[O]ne under arrested has the right to identification of those responsible for his arrest or his interrogation by police;

judicial authorities shall direct immediate release of those illegally arrested; no one shall be taken to prison or held therein when the law permits provisional liberty, with or without bond;

There shall be no civil imprisonment for debt, except for a person who voluntarily and inexcusably defaults on a support obligation and for an unfaithful depository;

*Habeas corpus* shall be granted whenever a person suffers or is threatened with suffering violence of coercion in his freedom of movement through illegality or abuse of power.

*Id.* art. 5, §§ LXIV-LXVIII, translated in 3 CONSTITUTIONS, *supra* note 5 (section numbers omitted).

<sup>290</sup> For example, in Russia, the right to appeal is constitutionalized exclusively with regard to criminal procedures. RUSS. CONST. art. 50.

<sup>291</sup> The formulation of some of these rights is sometimes unnecessarily vague. For example, the Constitution of Armenia confirms a right to access the courts, ARM. CONST. art. 38, but the drafters also incorporated in Article 38 an awkward and unclear statement authorizing any person to defend rights and freedoms "by all means not otherwise prescribed by law," *id.*, translated in 1 CONSTITUTIONS, *supra* note 5. This clause was intended to allow victims of human rights violations to appeal to international human rights organizations. In its recent wording, however, it only repeats the well-known idea that the individual's freedoms are in the area not prohibited by law.

<sup>292</sup> These rights have usually been recognized by the new East-Central European constitutions. See, e.g., LAT. CONST. art. 92; LITH. CONST. art. 31.

<sup>293</sup> For example, the "lesser punishment principle" was introduced by the constitutions of Russia, Azerbaijan, and Estonia; however, it was rejected by the Armenian Constitution. ARM. CONST. art. 42 (providing that laws limiting or increasing liability shall not have retroactive effect). With the exception of Tajikistan, TAJ. CONST. art. 20, the issue was not addressed by other Central Asian states.

tions vary also with regard to the right to moral and material compensation for wrongs resulting from unjust and revoked court verdicts.<sup>294</sup>

The constitutionalization of due process rights in Latin American states is selective and the criteria for the distinction between fundamental rights, which are given constitutional coverage, and other rights guaranteed by implementing laws are by no means clear. For example, Article 18 of the Argentinean Constitution gives constitutional protection against arbitrariness, confirms the right to trial, guarantees that an offense will be judged on the basis of prior law, and prohibits *ad hoc* tribunals. It also repeats the old Roman principle *nemo tenetur seipsum accusare*<sup>295</sup> prohibiting self-incrimination.<sup>296</sup> The Constitution does not mention, however, several other equally fundamental rights listed above.<sup>297</sup>

The Constitution of Brazil states that the list of due process rights is not exhaustive.<sup>298</sup> It expressly mentions the principle of non-retroactivity (except for situations which benefit the defendant), presumption of innocence, the right to a fair and public trial (restricted only for the protection of privacy or social interest), the prohibition of evidence obtained through illicit means, and free legal assistance to those who may not have sufficient income to cover the costs of counsel.<sup>299</sup> The Constitution also guarantees the right to compensation for damages caused by illegal actions.<sup>300</sup>

<sup>294</sup> For example, this right is guaranteed by the Armenian and Russian constitutions but not by the Constitution of Moldova. Compare ARM. CONST. art. 40, and RUSS. CONST. arts. 52, 53, with MOLD. CONST. The protection of the rights of persons who suffered from crimes and their rights to compensation is less clearly expressed by the Constitution of Azerbaijan. AZER. CONST. art. 68, § 1, translated in 1 CONSTITUTIONS, *supra* note 5 ("The rights of a person who has been a victim of a crime and abuse of power shall be protected by the State. A victim has the right to participate in court examination and to demand compensation for damage caused to him.").

<sup>295</sup> No one is obliged to betray himself.

<sup>296</sup> ARG. CONST. art. 18. The Constitution of Costa Rica also extends this right to descendants of the accused person. COSTA RICA CONST. art. 36.

<sup>297</sup> Similarly, the Peruvian Constitution confirms that the list of fundamental rights is not exhaustive and expressly constitutionalizes very few procedural guarantees in criminal trials. Besides rights protecting individuals against arbitrary arrest, it includes the right to defense, freedom from *ex post facto* laws, and the presumption of innocence. PERU CONST. art. 2, §§ 23, 24(d), (e). Venerated principles of due process, such as the prohibitions against double jeopardy and self-incrimination, the lesser punishment principle, and the exclusion of illegally gathered evidence, are not directly covered by the Constitution.

<sup>298</sup> BRAZ. CONST. art. 5, § 2°.

<sup>299</sup> *Id.* art. 5.

<sup>300</sup> *Id.*

The constitutions of Colombia and Mexico are more elaborate with regard to due process rights. They emphasize the right to access the courts and the right to appeal.<sup>301</sup> The constitutions declare several well-recognized principles of criminal law, such as the right to counsel, presumption of innocence, preponderance of evidence, the double jeopardy clause, non-retroactivity, the lesser punishment principle, and the inadmissibility of improperly seized evidence (the poisonous tree doctrine).<sup>302</sup>

### 5. *Freedom of Movement*

The major international human rights documents require parties to guarantee freedom of movement within the country and freedom of selection of residence to everyone lawfully within the territory of the state.<sup>303</sup> These standards are generally guaranteed by the constitutions of Russia, Kazakhstan, Kyrgyzstan, Georgia, and Azerbaijan, while the Armenian and Uzbekistani laws are more restrictive and guarantee freedom of movement only to citizens.<sup>304</sup> The Constitution of Tajikistan does not address freedom of movement within the territory of the country; it only allows citizens to choose their place of residence and to leave and return to the state.<sup>305</sup> The Constitution of Ukraine guarantees this freedom to everyone legally admitted to the country.<sup>306</sup> In 1998, the regulation requiring foreigners to obtain special permits to visit areas within eighteen to thirty miles of Ukraine's border was rescinded.<sup>307</sup> Citizens are also permitted to travel freely abroad. The U.S.

<sup>301</sup> COLOM. CONST. arts. 28-36; MEX. CONST. art. 23.

<sup>302</sup> Compare COLOM. CONST. arts. 29, 30, 35 (prohibiting life imprisonment, confiscation of property, extradition for political crimes, and confirming the rights against self-incrimination or testifying against immediate family members—but not explicitly guaranteeing a right to a public trial or the right not to be tried in default), with MEX. CONST. art. 20 §§ IV, VI, IX (confirming the right to cross-examine and confront witnesses, the right to counsel, the right to a public trial by a judge or jury, and the right to bail).

<sup>303</sup> See, e.g., ICCPR, *supra* note 222, art. 12, § 1; ACHR, *supra* note 224, art. 22.

<sup>304</sup> See generally AZER. CONST.; GEOR. CONST.; KAZ. CONST.; KYRG. CONST.; RUSS. CONST. But see ARM. CONST. art. 22 (granting everyone the right to leave the country, but only entitling citizens to return).

<sup>305</sup> TAJ. CONST. art. 24.

<sup>306</sup> UKR. CONST. art. 33.

<sup>307</sup> BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEP'T, *Ukraine, in COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2002* (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002/18398.htm>. The Report states:

The Constitution provides for these rights [the right to free movement], and the Government generally respected them in practice; however, there were

State Department reports, however, that the registration or "propyska" system is still retained by the Ukrainian government.<sup>308</sup>

In Latin America, the scope of the right to freedom of movement varies as well. For example, the constitutions of Brazil, Chile, Mexico, and Peru grant to every person the right to freely move throughout the territory of the country in time of peace;<sup>309</sup> the Constitution of Argentina guarantees the right to freedom of movement to "[a]ll inhabitants of the Nation;"<sup>310</sup> and in Colombia and Costa Rica, this right is reserved only to citizens and even they are exposed to the limitations established by statutory laws.<sup>311</sup>

### B. Property Rights

The main international documents on human rights do not contain elaborate statements on property. The Universal Declaration of Human Rights declares the general right to own property and prohibits its arbitrary deprivation.<sup>312</sup> The European Convention does not refer to property rights, but the First Protocol to the Convention confirms the right to peaceful possession of property as well as the limited right of the state to control the use of property in accordance with the general interest and principles of international law.<sup>313</sup> The American

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some limitations. Until November 2001, the propyska system—a nationwide requirement to register at the workplace and place of residence in order to be eligible for social benefits—remained in place; access to certain social benefits was limited to the place where one was registered.

*Id.*

<sup>308</sup> *Id.*

<sup>309</sup> BRAZ. CONST. art. 5, § XV; MEX. CONST. of 1917, art. 11; CHILE CONST. art. 19, § 7(a) (stating that every person has the right to move in Chile if it does not affect equal rights of other persons and does not violate the law); PERU CONST. art. 2, § X; 137, § I (making the right to free movement subject to limitations based on health, judicial mandate, application of foreign law, and potential restriction during state of emergency).

<sup>310</sup> ARG. CONST. art. 14, *translated in* 1 CONSTITUTIONS, *supra* note 5.

<sup>311</sup> COLOM. CONST. art. 24; COSTA RICA CONST. art. 22.

<sup>312</sup> UDHR, *supra* note 248, art. 17. International law commentators observed, "There is lack of agreement on the scope of this right and permissible limitations on it, but the right of an individual to own property and not to be deprived of it arbitrarily is recognized as a human right." BURNS H. WESTON ET AL., *Editor's Note*, INTERNATIONAL LAW AND WORLD ORDER: A PROBLEM ORIENTED COURSEBOOK 776 (3d ed. 1997).

<sup>313</sup> Protocol [No. 1] to the Convention for the Protection of Human Rights and Fundamental Freedoms, March 20, 1952, art. 1, 213 U.N.T.S. 262, 262 [hereinafter Protocol No. 1]. The references to the right to property have been eliminated from international covenants as a result of opposition by socialist states. Novak, *supra* note 226, at 100-01. As a result, the violation of property rights in the countries which signed the UN international covenants is exceptional.

Convention on Human Rights prohibits exploitation and guarantees everyone's right to the use and enjoyment of property.<sup>314</sup> However, individual property rights are subordinated to the interest of society.<sup>315</sup> The Convention grants states a limited right to expropriate "for reasons of public utility or social interest, and in the cases and according to the forms established by law."<sup>316</sup>

International law usually confirms the right of the state to control the property of nationals within its boundaries, and it is not always consistent regarding the state's liability for taking the property of aliens. The so-called Western doctrine insists that a "legal" taking of the property of nationals of other states be (1) for public interest, (2) nondiscriminatory, and (3) accompanied by just compensation.<sup>317</sup> However, some elements of this doctrine are missing in several international resolutions adopted by the UN General Assembly. Commenting on Article 2 of the Charter of Economic Rights and Duties of States, Burns Weston wrote: "A break from the past seems clear. The so-called public purpose (or public utility) doctrine is disregarded. The 'doctrine of alien nondiscrimination' is ignored. And the much heralded international law principle of compensation appears to be 'domesticated,' i.e. rejected as an international regulatory norm."<sup>318</sup> The doctrine developed by Argentine writer Carlos Calvo in the second half of the nineteenth century also departed from the main assertions of the Western doctrine. Calvo's doctrine, which focused on the prohibition of discrimination of nationals rather than of foreigners,<sup>319</sup> has been adopted in many Latin American constitutions and is well-known to socialist constitutionalism.

The drafters of the bills of rights in Latin America and the states of former Soviet dominance were familiar with the basic international standards of protection of private property rights. All new constitutions in these regions have incorporated the right to property. A more detailed comparison of the constitutional coverage of this right reveals a common tendency to incorporate into the constitutions of both regions elements of social or distributive justice

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<sup>314</sup> ACHR, *supra* note 224, art. 21, § 3.

<sup>315</sup> *Id.* art. 21, §§ 1, 2.

<sup>316</sup> *Id.* art. 21, § 2.

<sup>317</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 712 (1987).

<sup>318</sup> WESTON, *supra* note 312, at 790 (quoting Burns Weston, *The Character of Economic Rights and Duties of States and the Deprivation of Foreign-Owned Wealth*, 75 A.J.I.L. 437, 438-39 (1981)).

<sup>319</sup> CARLOS CALVO, *LE DROIT INTERNATIONAL THEORIQUE ET PRATIQUE* § 1276 (5th ed. 1896).

permitting the state's significant role in the relatively egalitarian distribution of wealth. Several examples illustrate variations of this trend.

The drafters of the Russian and Ukrainian constitutions attempted to meet Western standards of protection by permitting the taking of property only on the basis of a court decision, in situations involving public interest, and for fair and immediate compensation.<sup>320</sup> These constitutions do not explicitly prohibit discrimination in the process of expropriation; however, this may be prevented by upholding the general principle of equality before the law.

Although the other post-socialist countries tried to follow suit, differences still exist. They are particularly visible in an uneven approach to the ownership of the land. Some constitutions restrict the right to purchase certain land only to citizens of the country,<sup>321</sup> while other constitutions, such as the constitution of Georgia, take a more market-oriented approach and extend this right to everyone.<sup>322</sup>

Some constitutions, namely, the Latvian and Estonian constitutions, prohibit the use of property in a manner contrary to public interest.<sup>323</sup> States such as Tajikistan, permit the taking of property for "the needs of state,"<sup>324</sup> rather than for more justifiable public purposes. The different wording has consequences as it gives excessive discretion to the government to expropriate for political rather than social reasons. In Moldova, the right to private property is linked to specific duties of the owners.<sup>325</sup> Some of these obligations, such as the obligation to respect "good neighborly relations" or the indeterminate reference to "all the other duties that have to be fulfilled by owners of private property under the law,"<sup>326</sup> leave considerable freedom to the state to impose limitations which might discourage foreign private investors.<sup>327</sup>

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<sup>320</sup> RUSS. CONST. art. 35, § 3; UKR. CONST. art. 41.

<sup>321</sup> See, e.g., LITH. CONST. art. 47; EST. CONST. art. 32, *translated in 6 CONSTITUTIONS, supra* note 5 ("The law may establish, in the public interest, categories of property in Estonia which are reserved for ownership by Estonian citizens, certain categories of legal persons, local governments or the Estonian state.").

<sup>322</sup> GEOR. CONST. art. 21, § 1.

<sup>323</sup> EST. CONST. art. 32; LAT. CONST. art. 105.

<sup>324</sup> TAJ. CONST. art. 32. On the other hand, the provision of the Constitution requiring the consent of the owner for a taking of property seems unusual and contradicts the *per se* compelling character of expropriation. *Id.* This should go further, the Tajikistan Constitution allows state confiscation only (1) on the basis of law, (2) with *consent of the owner*, and (3) with full compensation. TAJ. CONST. art. 32.

<sup>325</sup> MOLD. CONST. art. 46, § 5.

<sup>326</sup> *Id.*

<sup>327</sup> The drafters of the Belarusian Constitution went even further and incorporated the old-

A general overview of the Latin American constitutions reveals more elaborate coverage of property rights than in the post-Soviet constitutions.<sup>328</sup> As observed above, the drafters of several Latin American constitutions seem to share with their post-socialist counterparts a general sensitivity to a possible collision between the full and unlimited protection of individual property rights and the public or communal interest. Several examples illustrate this tendency.

Social or communal sensitivity can be clearly identified in the constitutions of Colombia<sup>329</sup> and Peru;<sup>330</sup> this trend is also reflected by the Brazilian

fashioned socialist statement that the exercise of property rights is contingent on social benefits and security and cannot be harmful to the environment, historical, and cultural treasures, or infringe upon the rights of other persons. BELR. CONST. art. 44, § 3. These types of vague constitutional restrictions may encourage governments to use regulatory and taxation measures to take control over property without formal transfer of title and just compensation. See Burns H. Weston, "Constructive Takings" Under International Law: A Modest Foray into the Problem of "Creeping Expropriation", 16 VA. J. INT'L L. 103, 133-70 (1975) (commenting on the strategies of so-called "creeping expropriation" or "constructive taking"); see also Mirjam Schiffer & Beatrice Weder, *Catastrophic Political Risk Versus Creeping Expropriation: What Determines Private Infrastructure Investment in Less Developed Countries?* (July 2000), at <http://www.isnie.org/ISNIE00/Papers/Schiffer-Weder.pdf>.

<sup>328</sup> For example, in Argentina, property is the most covered right in comparison to other substantive personal rights. ARG. CONST. art. 17. Following international standards of protection, the Constitution prohibits arbitrary deprivation of property, but grants the state the limited right to control the use of property in accordance with the general public interest. It distinguishes confiscation from expropriation—while confiscation is prohibited by the Constitution, the expropriation of property by the state is allowed if authorized by a court judgment in accordance with the law, done for public utility, and preceded by compensation. *Id.*

<sup>329</sup> In Colombia, property rights are not recognized as fundamental. Chapter I of the Constitution does not cover the right to property but surprisingly guarantees the right to work as a fundamental right, although promising no more than "dignified and equitable" conditions of work and the right to choose a profession. COLOM. CONST. arts. 25-26, *translated in 4 CONSTITUTIONS, supra* note 5. Instead, property rights are covered by the chapter on economic and social rights. *Id.* arts. 58-64. The Constitution guarantees the right to private property and other related rights, but states that they may be restricted by "public necessity or social interest." *Id.* art. 58. These limitations are reminiscent of socialist statements that "property is a social function that implies obligations." U.S.S.R. CONST. art. 13 (1977).

The Colombian Constitution prohibits the confiscation of property, but allows expropriation "[b]ecause of public necessity or social interest as defined by the legislator [sic]." COLOM. CONST. art. 58, *translated in 4 CONSTITUTIONS, supra* note 5. The Constitution does not mention a prohibition against discrimination in the expropriation process. It allows the legislature to expropriate property without compensation for the vague reasons of equity and public necessity without any available appeal for judicial review of these decisions. *Id.* In addition, during wartime, the government may decide to expropriate property without any prior

Constitution's references to the "social function" of the property<sup>331</sup> and the provisions of the Constitution of Mexico claiming that "[o]wnership of the lands and waters within the boundaries of the national territory is vested originally in the Nation."<sup>332</sup>

The concern about social justice confirms again the close links between the legal and political culture of both regions. The approach, rooted in the socialist legacy of post-Soviet states, is admittedly less explainable in Latin America; in both cases, however, it makes the constitutions less consistent with Western market-oriented priorities.

### *C. The Right to Privacy and Related Rights*

The right to privacy is widely guaranteed by international declarations and agreements, such as the Universal Declaration of Human Rights,<sup>333</sup> the European Convention on Human Rights,<sup>334</sup> and the International Covenant on

indemnification. *Id.* arts. 58-59. Even expropriation based on a judicial organ's decision might undermine the confidence of investors in the stability of the Colombian economic system as the Constitution reserves unusual discretion for the courts to "nullify ownership of property when [it] is injurious to the public treasury or seriously harmful to social morality." *Id.* art. 34.

<sup>330</sup> The Fundamental Personal Rights Chapter in Peru's Constitution laconically lists property and inheritance among rights guaranteed to everyone. PERU CONST. art. 2, § 15. The Constitution elaborates on these rights in separate chapters on property and the economic system of the state. Chapter I of Title III recognizes economic pluralism and the coexistence of diverse forms of property and enterprise. Chapter III of Title III guarantees the inviolability of the right to property although it again emphasizes that property rights have to be exercised in "harmony with the common good." *Id.* art. 70. Peru's Constitution appeals to "collective interests" in the manner typical of post-socialist constitutionalism. See LUDWIKOWSKI, CONSTITUTION-MAKING, *supra* note 15, at 230.

A legal taking of property in Peru requires compensation and non-discrimination against foreigners and has to be carried out for reasons of national security or public interest. PERU CONST. arts. 70-71. The Constitution, however, provides for some exceptions prohibiting foreigners from acquiring or possessing property, such as mines, forest, land, waters, and natural resources within fifty kilometers of the borders and permitting the state to adopt laws temporarily limiting property rights for reasons of national security. *Id.* arts. 71-72.

<sup>331</sup> BRAZ. CONST. art. 5, § XXIII, translated in 4 CONSTITUTIONS, *supra* note 5. Article 5 also allows expropriation on the basis of procedures established by law and "upon just and prior compensation in cash, with the exception of cases provided in this Constitution." *Id.* art. 5, § XXIV.

<sup>332</sup> MEX. CONST. art. 27, translated in 12 CONSTITUTIONS, *supra* note 5 (confirming the right of the Nation "to transmit title [to lands and waters within its national territory] to private persons, thereby constituting private property").

<sup>333</sup> UDHR, *supra* note 248, art. 12.

<sup>334</sup> ECHR, *supra* note 208, art. 8.



Civil and Political Rights.<sup>335</sup> This right was defined by Resolution No. 42 (1970) of the Council of Europe's Parliamentary Assembly as "the right to protection of everyone's life with minimum interference," which usually encompasses the right to privacy of family life, the home, and correspondence.<sup>336</sup> According to international standards, constitutions protect privacy rights from arbitrary interference by attempting to specify most of the exceptions in the constitutional acts themselves. For example, restrictions on the right to privacy might be permitted only for social reasons, such as security, health, morals, or prevention of crimes. Collecting, storing, and disseminating information on a person's private life without consent thus should be prohibited.

Some of the post-socialist constitutions, predominantly those in the satellite countries of the former Soviet Union, are quite elaborate with regard to the right to privacy and related rights. Clearly, the constitutional drafters in several of these countries recognized the importance of this right as one of the inventions of post-socialist constitutionalism. For example, in Poland, the right to privacy received only partial recognition in the Press Law of January 26, 1984 (Article 14.6), but the Constitution of 1997 gives much broader coverage to this right. The 1997 Polish Constitution guarantees everyone the legal protection of private and family life; honor and good reputation, which includes the right of parents to raise their children in accordance with their convictions; freedom and privacy of communication; and the inviolability of the home.<sup>337</sup> The related right to privacy of information is less clearly delineated. The Constitution confirms the general right of everyone to access official documents and data collected on them and to demand the correction of incomplete or false information.<sup>338</sup> Nevertheless, the limitations imposed on the right of public authorities to collect information on citizens and on the right to demand the disclosure of private information were left to statutory regulations, creating an impression of insecurity and indecisiveness among the constitutional drafters.<sup>339</sup> The relatively elaborate provisions of Articles 30 through 32 of the Constitution of Ukraine also guarantee the protection of the privacy of individuals and their families, as well as the inviolability of the

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<sup>335</sup> ICCPR, *supra* note 222, art. 17.

<sup>336</sup> See Novak, *supra* note 226, at 88-89.

<sup>337</sup> POL. CONST. arts. 49-50.

<sup>338</sup> *Id.* art. 51.

<sup>339</sup> Marek Safjan, *Prawo do ochrony życia prywatnego* [Right to the Protection of Private Life], in *PODSTAWOWE PRAWA I ICH OCHRONA* [Fundamental Rights and Their Protection] 144 (L. Wisniewski ed., 1997).

home, correspondence, and other means of communication.<sup>340</sup> The other new constitutions of the former Soviet Republics put much less emphasis on the protection of the right to privacy. The wording of right to privacy clauses in the constitutions of Latvia and Lithuania is so general that it leaves a great deal to be desired.<sup>341</sup>

Some constitutional provisions nevertheless may surprise commentators. For example, Article 20 of the Armenian Act goes beyond the typical statements of the new constitutions of this region and pronounces an individual's right to defend his or her private and family life and honor and reputation from attack. The scope of the right to self-defense as well as its necessary limitations is not explained by the Constitution. Confronted with the principle of the direct applicability of constitutional provisions, the decision of the drafters to leave the concept of self-defense to the courts' interpretation confirms only their indecisiveness as well as the vague character of the Constitution itself.

The Georgian Constitution protects individuals' private life, place of personal activity, and the inviolability of correspondence and other means of communication.<sup>342</sup> Restrictions on this freedom can be imposed only on the basis of a court order or for reasons determined by law.<sup>343</sup> The Act does not explicitly confirm the inviolability of family life; it does, however, declare the state's protection of the family, children, and equal rights of spouses.<sup>344</sup>

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<sup>340</sup> UKR. CONST. arts. 30-32. The Constitution also protects the right to marry, prohibits forced marriages, and guarantees equality of spouses. *Id.* art. 51. Collecting, storing, and disseminating information on private life without consent is prohibited. *Id.* art. 32. The Constitution lists the prevention of crime as the only reason for the limitation of the right to privacy. *Id.* art. 31.

<sup>341</sup> The constitutions protect individuals' inviolability of correspondence and other means of communication, privacy of information, and privacy of family life. LAT. CONST. art. 96; LITH. CONST. art. 22. They declare the inviolability of private residences, which can be invaded only on the basis of a court order or for the protection of public order, individual life, health, or property, or for the apprehension of criminals. *See* LAT. CONST. arts. 26, 27; LITH. CONST. arts. 22, 24. The explanation of the substance of these rights and their limitations were left to implementing laws and court rulings. The Moldovan Constitution confirms only "everybody's" right to access information, and permits limitation of this right only for the protection of citizens and national security. MOLD. CONST. art. 34. The constitutions of Armenia and Azerbaijan confirm the right to privacy and the inviolability of the home, correspondence, and other means of communication. ARM. CONST. arts. 20, 21; AZER. CONST. arts. 32, 33.

<sup>342</sup> GEOR. CONST. art. 36.

<sup>343</sup> *Id.*

<sup>344</sup> *Id.*

The laconic provisions of the constitutions of the countries of Central Asia generally duplicate standards of protection provided for in Article 17 of the International Covenant on Civil and Political Rights. The constitutionalized right to privacy covers personal or family life; the protection of honor and dignity; confidentiality of communication, bank deposits and savings; and access to public information concerning a person's rights and interests.<sup>345</sup>

Although the older Latin American constitutions did not usually refer to the right to privacy, the current trend of extending coverage of this right is clear. For example, neither the 1853 Constitution of Argentina nor the 1917 Constitution of Mexico directly addressed the right to privacy. Although the constitutional reforms of the second half of the nineteenth century were adopted to strengthen the constitutional protection of human rights, the amended constitutions are not very elaborate concerning these rights. The Constitution of Argentina prohibits arbitrary interference with the family, home, or correspondence, leaving the law to determine of the reasons for allowable searches and seizures.<sup>346</sup> The Constitution of Mexico prohibits violations of sealed correspondence and requires a judicial warrant for searches.<sup>347</sup> However, it allows administrative officials to enter private homes to check on compliance with sanitary, fiscal, and police regulations, limited only by vaguely described "respective laws."<sup>348</sup>

The Latin American constitutions adopted in the last two decades of the twentieth century put more emphasis on the protection of privacy. The drafters attempted to follow Article 11 of the American Convention on Human Rights in a manner generally resembling the approach of the drafters of the new post-socialist constitutions trying to meet their regional human rights standards. For example, the Constitution of Brazil refers directly to the protection of privacy and private life,<sup>349</sup> and guarantees the secrecy of correspondence and electronic communication,<sup>350</sup> access to information,<sup>351</sup> and the inviolability of the home

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<sup>345</sup> See, e.g., KAZ. CONST. art. 18; KYRG. CONST. art. 39, §§ 2, 3; TAJ. CONST. arts. 22, 23.

<sup>346</sup> ARG. CONST. art. 18, *translated in* 1 CONSTITUTIONS, *supra* note 5 ("The residence is inviolable, as are letters and private papers; and a law shall determine in what cases and for what reasons their search and seizure shall be allowed."). Although the government generally respects these prohibitions, monitoring agencies reported that "[i]n practice, local police stop and search individuals without probable cause." *Argentina*, in COUNTRY REPORTS-2001, *supra* note 238.

<sup>347</sup> MEX. CONST. arts. 16, 25.

<sup>348</sup> *Id.* art. 16.

<sup>349</sup> BRAZ. CONST. art. 5, § X, *translated in* 3 CONSTITUTIONS, *supra* note 5.

<sup>350</sup> *Id.* art. 5, § XII.

<sup>351</sup> *Id.* art. 5, § XIV.

except in "cases of flagrante delicto, disaster or rescue, or, during the day, with a court order."<sup>352</sup>

The 1991 Constitution of Colombia guarantees everyone legal protection of private and family life, which includes freedom and privacy of communication and the inviolability of the home.<sup>353</sup> The 1993 Constitution of Peru follows suit. It covers personal and family life; the protection of honor and good reputation; confidentiality of bank deposits, savings, and tax information; and the inviolability of the home.<sup>354</sup> The related right of "privacy of information" confirms the general right of all persons to access official documents and data collected on them and the right to demand corrections of incomplete or false information.<sup>355</sup> Information that affects national security or is expressly excluded by law cannot be disclosed.<sup>356</sup>

#### *D. Political and Civil Freedoms*

Protection of political and civil freedoms, such as freedom of thought, conscience, religion, speech, opinion and expression, information and media, association, and assembly, is usually recognized as *conditio sine qua non* of the protection of participatory political rights in democratic societies.<sup>357</sup> The self-organizing functions of societies and the participation of citizens in power are impossible without free communication between individuals and freedom to join others in establishing groups, social units, or gatherings that would help them to manifest their opinions and pursue social and political goals independent of the state.

Both political and civil freedoms and participatory political rights are constitutionalized by all democratic constitutions; however, the level of generality of these acts varies from state to state. There are no uniformly adopted standards of protection for freedom of speech and religion by the new

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<sup>352</sup> *Id.* art. 5, § XI.

<sup>353</sup> COLOM. CONST. art. 15. The related right of "privacy of information" is less clearly explained. The Constitution confirms the general right of all persons to access official documents and data collected on them but does not explicitly give individuals the right to demand corrections of incomplete or false information. Some limitations imposed on the right to privacy of information for tax purposes were left to statutory regulations. *Id.*

<sup>354</sup> PERU CONST. art. 2, §§ 3-9.

<sup>355</sup> *Id.* art. 2, § 4.

<sup>356</sup> *Id.* art. 2, § 5.

<sup>357</sup> These freedoms are recognized in Articles 9-11 of the European Convention on Human Rights, ECHR, *supra* note 208, and Articles 18-22 of the International Covenant on Civil and Political Rights, ICCPR, *supra* note 222.

post-socialist constitutions, and in some states, namely, the countries of South Caucasus and Central Asia, the coverage of these rights is exceptionally weak. Given human rights monitoring organizations' reports on numerous violations of religious freedoms in this area, the weak constitutionalization of the right to religious freedom is especially alarming,<sup>358</sup> and this fact should be brought to the attention of the drafters of the regional bills of rights.<sup>359</sup>

Most of the states of Central Asia prohibit religious parties.<sup>360</sup> The position of Tajikistan is an exception. Constitutional amendments, added by the national referendum held on September 26, 1999, changed the provisions of the May 1998 law prohibiting the entry of religious political groups into the parliament.<sup>361</sup> The amended Article 28 states, "Citizens have the right of association; a citizen has the right to participate in creation of political parties including those of a democratic, religious and atheistic character, professional unions, and other social associations, [and] to voluntarily join or leave such organizations."<sup>362</sup>

The constitutionalization of religious freedom in the Slavic Republic of the former Soviet Union is more extensive. The Russian Constitution guarantees freedom of conscience and religion.<sup>363</sup> This freedom encompasses the

<sup>358</sup> See generally BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEP'T, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES-2002 (2003), available at <http://www.state.gov/g/drl/rls/hrrpt/2002>.

<sup>359</sup> For example, the Armenian, Georgian, and Tajik constitutions simply mention freedom of religion; most of the other constitutions of the non-Slavic "southern cluster" of republics of the former Soviet Union do not even explain the relationship between the state and religious organizations or between religious institutions themselves. Instead, they ambiguously state that restrictions on the freedom to exercise religion might be imposed only on the grounds prescribed for in the imposition of martial law. Nevertheless, some exceptions can be observed. The Azerbaijani Constitution, for example, elaborates on the relationship between the state and religion more than the constitutions of the other states in this region. It clearly emphasizes the secular character of the state, AZER. CONST. art. 7, § I, and guarantees freedom of conscience and the right to manifest and disseminate religious beliefs, *id.* art. 48, §§ I, II. It also lists permissible restrictions imposed on the right to express convictions. *E.g.*, *id.* art. 48, § III. The Constitution of Uzbekistan also confirms the separation of church and state and nonintervention of the state in religious associations. UZB. CONST. art. 61.

<sup>360</sup> See, *e.g.*, KAZ. CONST. art. 5, § 3; KYRG. CONST. art. 8, § 4.

<sup>361</sup> TAJ. CONST. art. 28.

<sup>362</sup> *Id.*, translated in 18 CONSTITUTIONS, *supra* note 5. The new constitution allowing religion-based political parties paved the way for the introduction of members of opposition parties into parliament, including the most important opposition group, the Islamic Renaissance Party. In this way, some democratic aspects of political pluralism have been implanted into the authoritarian framework of the Tajik system of governance.

<sup>363</sup> RUSS. CONST. art. 28.

selection of religion or faith and the manifestation of choice in the form of worship, observance, and practice and dissemination of religious beliefs.<sup>364</sup> The Constitution guarantees public, private, individual, and group manifestations of religious convictions.<sup>365</sup> It does not directly address the concept of religious equality, but it guarantees the separation of the state and religious organizations.<sup>366</sup> The Constitution prohibits propaganda of “social, racial, national, religious or racial superiority” and behaviors inciting “social, racial, national hatred and strife.”<sup>367</sup> Additional restrictions might be imposed by law for general reasons enumerated in Article 55, such as protection of health, dignity, private life, morals, defense of the country, security of the state, and protection of the constitutional order.<sup>368</sup>

The Ukrainian Constitution guarantees public or private and individual or group manifestations of religious convictions.<sup>369</sup> The exercise of this right may be restricted for public order, health, morality, and equal rights and freedoms of others.<sup>370</sup> Instead of addressing the concept of religious equality, the Constitution elaborates on the separation of church and state and the secular

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<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *See id.* In 2000, the U.S. State Department reported that

On November 23, the Constitutional Court upheld the provision of the 1997 religion law that requires religious organizations to prove fifteen years of existence in the country in order to be registered. However, the Court also ruled that religious organizations that were registered before the passage of the 1997 religion law are not required to prove fifteen years' existence in the country in order to be registered.

BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, U.S. STATE DEP'T, *Russia, in COUNTRY REPORTS ON HUMAN RIGHTS-1999* (2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/356.htm>.

<sup>367</sup> RUSS. CONST. art. 29, § 2, translated in 15 CONSTITUTIONS, *supra* note 5.

<sup>368</sup> *Id.* art. 55. On September 19, 1997, Russia adopted the Law on Freedom of Conscience and Religious Organizations. Many international commentators claim that this law is more selective than its 1990 version, which granted religious rights basically to all religious faiths. The law was also criticized by Oleg Mironov, Russia's Human Rights Commissioner. During his visit at Zaoklsky Theological Seminary, Mironov observed that the law “does not agree with the national constitution.” *See Comments on Russian Implementing Laws Related to the Protection of Rights and Freedoms of Citizens*; see also Rebecca Scoggins, *Russia's Human Rights Commissioner Questions Religion Law*, Adventist News Network: Freedom & Faith (July 3, 2001), at <http://www.adventist.org/news/data/2001/06/0994163787/index.html.en>.

<sup>369</sup> UKR. CONST. art. 35.

<sup>370</sup> *Id.*

character of education.<sup>371</sup> It recognizes the right of conscientious objectors to perform alternative non-military services.<sup>372</sup>

The Constitution of Belarus guarantees the freedom to choose, profess, and spread religious beliefs and to participate in religious activities.<sup>373</sup> However, the drafters departed from the Russian model of a relatively full constitutionalization of religious freedom and reserved for the legislature the right to prohibit some rites and rituals without listing in the Constitution any reasons which may justify the imposition of restrictions.<sup>374</sup>

It may have been expected that with regard to freedom of thought and speech, inexperienced constitutional drafters from the remote areas of the former Soviet Union would follow the approach of the Russian constitutionalism. To some extent, this proved true, but only in the post-Soviet Slavic republics, while the countries of the Caucasus and Central Asia covered this right only symbolically.

The Russian Constitution guarantees freedom of thought and speech,<sup>375</sup> while prohibiting censorship.<sup>376</sup> Similar to the European Convention, the Russian Constitution links freedom of expression with freedom of information and mass media.<sup>377</sup> Similar to the Russian Constitution, the Ukrainian Constitution's bill of rights protects freedom of thought and speech while also addressing permissible restrictions on the freedom of expression.<sup>378</sup> The rationale of restrictions imposed for "authority and impartiality of justice"<sup>379</sup> is vague and it can authorize far-reaching interference of the state in the right of individuals to criticize state policies.

In comparison, the coverage of this right by the constitutions of the South Caucasian and Central Asian states is exceptionally sketchy. All the

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> BELR. CONST. art. 31.

<sup>374</sup> *Id.*

<sup>375</sup> RUSS. CONST. art. 29, § 1.

<sup>376</sup> *Id.* art. 29, § 5.

<sup>377</sup> *Id.* art. 29.

<sup>378</sup> UKR. CONST. art. 34. The limitations of this right stem from the generally recognized right of states to protect national security, society against crimes, territorial indivisibility, public order, health of the population, reputation and right to confidentiality of other persons.

<sup>379</sup> *Id.* With the exception of the short declaration of Article 15 that "[c]ensorship is prohibited," *id.* art. 15, translated in 19 CONSTITUTIONS, *supra* note 5, the right to a free press is noticeably absent from the Constitution. The absence of express protection of the press in the Constitution is compensated to some extent by the Law on News Agencies, which entered into force on February 28, 1995.

constitutions of the region guarantee freedom of expression. Some constitutions address freedom of the press separately and in so doing only confirm the prohibition of preventive censorship.<sup>380</sup> The Armenian Constitution, in contrast, does not clearly confirm freedom of the media or place prohibitions on censorship.

The constitutions of the Latin American states do not differ much from the approach of non-Slavic republics of the former Soviet Union and most of them provide superficial coverage of political and civil freedoms. Given the record of serious violations of these rights in Latin America, their late and weak constitutionalization is especially alarming.<sup>381</sup>

For example, in Argentina these rights are covered by the declaration of Article 14 covering the protection of property rights; freedom of work; navigation and trading rights; freedom of movement; and freedom of speech, press, and religion.<sup>382</sup> Collecting all these rights in a single article might have looked satisfactory in the nineteenth century, but it does not fit the standards of twentieth or twenty-first century constitutionalism. Using a similar approach as in Argentina's Constitution, omnibus Article 5 of the Constitution of Brazil guarantees freedom of expression; thought; and "intellectual, artistic, scientific, and communication activit[ies] . . . independent of censorship or license."<sup>383</sup> Article 5 also guarantees the inviolability of freedom of conscience and belief and the free exercise of religious beliefs within a framework determined by law.<sup>384</sup>

The coverage of these rights by the Colombian Constitution is also very shallow. Article 20 guarantees freedom of expression and the right to receive information and establish mass communication media.<sup>385</sup> Freedom of the media is guaranteed and the Constitution prohibits censorship.<sup>386</sup> However, the reference to a "social responsibility" of the media<sup>387</sup> is so vague that it may invite abuse.

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<sup>380</sup> See, e.g., AZER. CONST. art. 50.

<sup>381</sup> See Paul E. Sigmund, *Religious Human Rights: Religious Human Rights in Latin America*, 10 EMORY INT'L L. REV. 173 (1996).

<sup>382</sup> ARG. CONST. art. 14. Freedom of press is also confirmed by Article 32, which bans federal jurisdiction over the press. *Id.* art. 32.

<sup>383</sup> BRAZ. CONST. art. 5, §§ IV, IX, *translated in* 3 CONSTITUTIONS, *supra* note 5.

<sup>384</sup> *Id.* § VI.

<sup>385</sup> COLOM. CONST. art. 20.

<sup>386</sup> *Id.*

<sup>387</sup> *Id.*



The formal separation of church and state was not recognized in Latin America before the twentieth century and in some countries, such as Argentina and Bolivia, not before the second half of the century.<sup>388</sup> Several states in the region still recognize the special role of Catholicism. For example, the Constitution of Peru draws a distinction between the Catholic Church and other religions. It confirms the independent and autonomous character of the state, but avoids a straightforward declaration of the principle of separation of church and state. It recognizes the historical role of the Catholic Church and its traditional collaboration with the state, but admits that other religious denominations may establish mechanisms of cooperation as well.<sup>389</sup> The Constitution confirms the "freedom of information, opinion, expression and diffusion of ideas whether oral, written, or visual through any communications media without previous authorization or censorship or restraint whatsoever, under protection of law."<sup>390</sup> At the other extreme, the 1917 Constitution of Mexico adopted a number of anti-clerical provisions nationalizing church property and prohibiting church-sponsored education. "These provisions were circumvented through a variety of devices, but only in 1992 did the government of Carlos Salinas amend the anti-clerical, and indeed anti-religious, constitutional provisions."<sup>391</sup>

### *E. Political Rights*

In most modern constitutions, political rights stem from the constitutionalization of the fundamental principle of the state's democratic character. Constitutional expression of this principle emphasizes that (1) the people as a whole are a subject of sovereignty; (2) people manifest their will in a variety of ways, and the principle of political pluralism is fundamental to an efficient constitutional government; (3) "government of the people" means rule by the people's majority and respect for the rights of minorities and individuals; (4) government "by the people" incorporates representative government and elements of direct democracy; and (5) government "for the people" means the idea of civic society, which subordinates the state to

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<sup>388</sup> Sigmund, *supra* note 381, at 174.

<sup>389</sup> PERU CONST. art. 50.

<sup>390</sup> PERU CONST. art. 2, § 4, *translated in* 14 CONSTITUTIONS, *supra* note 5. Article 2 also criminalizes "[a]ny action which suspends or forbids any means of expression or impedes [its circulation] . . . . The rights to informing and expressing an opinion include those of establishing communications media." *Id.*

<sup>391</sup> Sigmund, *supra* note 381, at 180.

societal interests.<sup>392</sup> While most of these rights are covered by general principles of the state organization, some rights are commonly placed in the constitutional chapters encompassing the bill of rights.

Most constitutions reserve political rights for citizens.<sup>393</sup> Citizens have exclusive rights to appeal to state bodies and to participate in the governance of the state either through the exercise of electoral rights or access to governmental positions. Constitutionalized electoral rights usually cover the fundamental principles of a secret ballot and elections based on universal and equal suffrage, leaving the details of electoral systems to statutory regulations.<sup>394</sup>

Even in this relatively narrow and widely duplicated framework, some disparities in the formulation of political rights exist. Such differences are cross-national rather than cross-regional. For example, in some countries of both regions, citizens have exclusive rights to assembly and association;<sup>395</sup> in others, these rights are granted to all people.<sup>396</sup> In Russia, the right to associate is granted to everyone,<sup>397</sup> but the right to assemble is reserved for citizens of the Russian Federation.<sup>398</sup> In contrast, the right to assemble in Moldova is guaranteed to everyone with the exception of gatherings that are not peaceful or that are attended by armed persons.<sup>399</sup> Only citizens have the right to associate, however.<sup>400</sup> Party activities of foreigners and secret associations are

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<sup>392</sup> See Wojciech Sokolewicz, *Democracy, Rule of Law, and Constitutionality in Post-Communist Society of Eastern Europe*, 2 DROIT POLONAIS CONTEMPORAIN 6-7 (1990) (describing the constitutionalization of the principle of democracy and modern constitutional references to Abraham Lincoln's famous formula of "government of the people, by the people, for the people").

<sup>393</sup> The Constitution of Chile is an exception. It states, "Foreigners residing in Chile for more than five years and who comply with the requirements prescribed in the first paragraph of Article 13, may exercise the right to vote in the cases and in the manner determined by law." CHILE CONST. art. 14, translated in 4 CONSTITUTIONS, *supra* note 5.

<sup>394</sup> See, e.g., Ludwikowski, *supra* note 16, at 17-30 (analyzing electoral systems under the new post-socialist constitutions).

<sup>395</sup> ARM. CONST. art. 25 (guaranteeing citizens the right to form parties and everyone to create associations).

<sup>396</sup> E.g., ARG. CONST. art. 14, translated in 1 CONSTITUTIONS, *supra* note 5 (guaranteeing the right "of associating for useful purposes" to all inhabitants). The Constitution does not directly cover the right to assembly; it prohibits a "meeting of persons that attributes to itself the right to stand for the people." *Id.* art. 22.

<sup>397</sup> RUSS. CONST. art. 30, § 1.

<sup>398</sup> *Id.* art. 31.

<sup>399</sup> MOLD. CONST. art. 40.

<sup>400</sup> *Id.* art. 41, § 1.

prohibited.<sup>401</sup> Costa Rica grants the right to assemble to everyone<sup>402</sup> and the right to associate to inhabitants,<sup>403</sup> but only citizens have the right to organize political parties.<sup>404</sup>

Moreover, some constitutions deprive all imprisoned citizens sentenced by the courts of electoral rights;<sup>405</sup> others state that the deprivation of this right may be ordered by the courts, in accordance with international standards.<sup>406</sup> The drafters of the Azerbaijani Constitution surprisingly decided not only to restrict the electoral rights of professional military persons, judges, government officials, persons sentenced to imprisonment by court orders and clergy, but left the determination of the rights of "other people mentioned in the present Constitution and laws" to legislators' discretion.<sup>407</sup> Placing the declaratory statement, "if [the rights and freedoms of foreign persons and persons without citizenship] do not contradict the law,"<sup>408</sup> among the purely normative constitutional provisions on political rights only confirms the indecisiveness of the inexperienced constitutional drafters.

The referendum or plebiscite forms of direct participation in state power are recognized in the new post-socialist and Latin America constitutions. References to these instruments can be found in all new constitutions of the region of former Soviet dominance; the Constitution of Belarus even explains such mechanisms in separate chapters.<sup>409</sup> The constitutional draft of Kyrgyzstan further envisaged a model of plebiscitary democracy in which the state was "a state of people's self-government" and most important decisions, such as adopting the constitution, creating the parliament, electing the senate and the president, dissolving the legislature, and removing the president, occurred by referenda.<sup>410</sup>

The tendency to increase the people's political participation is clear in Latin America as well. While the original Argentinean Constitution stressed

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<sup>401</sup> *Id.* art. 41, §§ 5, 6.

<sup>402</sup> COSTA RICA CONST. art. 26.

<sup>403</sup> *Id.* art. 25.

<sup>404</sup> *Id.* art. 98 (amended 1975).

<sup>405</sup> *E.g.*, BRAZ. CONST. art. 15, § III.

<sup>406</sup> For example, in Russia, citizens may be deprived of participatory political rights only if they are recognized as "under special disability" or they are detained under a court decision. RUSS. CONST. art. 32, § 3, *translated in* 15 CONSTITUTIONS, *supra* note 5.

<sup>407</sup> AZER. CONST. art. 56, § III, *translated in* 1 CONSTITUTIONS, *supra* note 5.

<sup>408</sup> *Id.* art. 69, § 1.

<sup>409</sup> BELR. CONST. § III, ch. 2 (Referendum (National Voting)).

<sup>410</sup> *See generally* Koichuyev Draft of Kyrg. Const. (on file with Central East European Law Initiative).

the predominantly representative character of the country's political system,<sup>411</sup> amendments emphasized the forms of the people's direct participation in state power and became recognized as important democratic instruments. In order to ensure sufficient integration of the population and its contribution to an organized political life, the Constitution vests in the people the right to initiate the presentation of bills in the Chamber of Deputies; such bills must be processed within twelve months.<sup>412</sup> The Constitution also allows the Congress to submit bills to a popular referendum, which may have a binding or non-binding character.<sup>413</sup> The Colombian Constitution is also relatively elaborate with regard to direct participatory rights. These rights are repeatedly referenced to and cover the rights to participate in the direct administration of the state's affairs through plebiscites, referenda, popular consultations, and other measures in defense of the Constitution and the law.<sup>414</sup> The right to participate in referenda, plebiscites, and people's initiatives are also guaranteed by the Constitution of Brazil.<sup>415</sup>

In sum, the constitutionalization of political freedoms and rights in both regions is uneven. A study of the constitutional texts reveals that the constitutional drafters attempted to meet basic international standards, but they did not have the time or patience for exhaustive comparative analyses that would have allowed them to avoid ambiguities or excessive references to the implementing laws. In many cases the laws still do not fill gaps left by the constitutions, which results in severe manipulation of citizens' participatory rights. Governmental and nongovernmental human rights organizations monitor violations of political rights and provide alarming reports, which should be carefully studied by constitutional experts in both regions, who often seem to disregard existing divergences between theory and practice.

#### *F. Economic, Social, and Cultural Freedoms and Rights*

Traditionally, the American and European approaches to the protection of economic, social, and cultural rights differed. Following the tradition of French constitutionalism, European constitutions stressed the social duties of citizens and became replete with positive rights that an individual might claim

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<sup>411</sup> See ARG. CONST. art. 22.

<sup>412</sup> ARG. CONST. art. 39 (excluding constitutional amendments, international treaties, taxes, budgetary issues, and penal matters from popular initiatives).

<sup>413</sup> *Id.* art. 40.

<sup>414</sup> COLOM. CONST. art. 40, §§ 2, 6.

<sup>415</sup> BRAZ. CONST. art. 14.

against the government. While under the U.S. Constitution the government does not provide economic and social benefits to citizens,<sup>416</sup> in the beginning of the twentieth century, the constitutions of the European welfare states imposed numerous positive obligations on the government. For example, the German Constitution of 1919 stated, "It shall be the duty of the state and of the municipalities to maintain the purity, health, and social welfare of the family. Families of many children shall have the right to compensatory public assistance."<sup>417</sup> The Constitution of Finland (1919) provided, "The state shall support, or in case of need shall give grants-in-aid to institutions for instruction in the technical professions, in agriculture and its allied pursuits, in commerce and navigation, and in the fine arts."<sup>418</sup>

Bills of rights with numerous provisions addressing economic, social, and cultural rights also became a typical component of the socialist constitutions. Those provisions included the rights to work, rest and leisure, health, pensions, housing, education, and cultural benefits. The purpose of the incorporation of long lists of these rights was to emphasize the superiority of socialist constitutionalism over capitalist doctrine. Socialist experts proudly proclaimed that the elevation of these rights to the top of the list of fundamental constitutional principles emphasized the commitment of communist governments to eliminating capitalist exploitation and inequality.<sup>419</sup> Constitutional guarantees for social, economic, and cultural rights were recognized as basic criteria for distinguishing between the doctrine of socialist democracy and the so-called formal Western democracy.<sup>420</sup> According to socialists, formal democracy only offered freedom and equality before the law for producers and consumers who used market mechanisms. Capitalist constitutionalism placed social and

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<sup>416</sup> Louis Henkin concluded:

[E]conomic-social rights generally are not constitutionally protected [in the United States]. The United States has set an example of commitment and growth in civil and political rights, and has followed Europe in the respect of economic-social rights; although President Roosevelt proclaimed that the commitment of the United States to "Freedom from want" would be equal with other freedoms, economic-social rights have not achieved constitutional status in the United States.

Louis Henkin, *Introduction to CONSTITUTIONALISM AND RIGHTS*, *supra* note 79, at 8-9.

<sup>417</sup> [GRUNDGESETZ] [GG] [CONSTITUTION] art. CXIX, in HOWARD LEE MCBAIN & LINDSAY ROGERS, *THE NEW CONSTITUTIONS OF EUROPE 199* (1922).

<sup>418</sup> *Id.* art. 81.

<sup>419</sup> See Vyshinsky, *supra* note 159, at 552-57.

<sup>420</sup> *Id.*

economic rights in a second category, while socialist democracy embodied true distributive justice.<sup>421</sup>

After the fall of communism, the discussion about the differences between political, civil, economic, social, and cultural rights resurfaced, with commentators in the Americas and Europe exchanging arguments in favor and against a qualitative distinction between the rights.<sup>422</sup> It was clear that the new post-socialist democracies and economically vulnerable Latin American states hardly could afford to provide their societies significant packages of social benefits. Building on this argument, some constitutional experts tried to distinguish between fundamental and other rights, placing social and economic rights into the other judicially unenforceable category.<sup>423</sup> Several arguments have been produced to support this position.

First, it was argued that social and economic rights are by nature collective rather than individual and it is very difficult for the courts to assess an appropriate remedy which could compensate for violations of these rights.<sup>424</sup> Second, these types of rights require positive intervention from the state rather than negative protection.<sup>425</sup> Legislative or governmental bodies can better provide social, economic, and cultural benefits than courts. Third, the level of protection of these rights can be measured by results rather than conduct, and the evaluation of results usually occurs in the political rather than judicial process.<sup>426</sup> Fourth, objective evaluation of the content of these rights is difficult and would impose formidable tasks on judges.<sup>427</sup> Fifth, a decision of the judges on a violation of the other rights would involve courts in conflicts with other powers that might adversely impact the relationship between the three branches of government.<sup>428</sup>

Other constitutional experts argued against the distinction between the rights of first and second rank, claiming that all rights are interdependent, indivisible,<sup>429</sup> deliver benefits, and contain no qualitative difference among

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<sup>421</sup> See Ludwikowski, *supra* note 71, at 87-90.

<sup>422</sup> See Spencer Zifcak, *Adjudicating Social Rights: Lessons from the Hungarian Constitutional Experience*, 4 E. EUR. HUM. RTS. REV. 51, 56-58 (1998).

<sup>423</sup> See *id.* at 51-54.

<sup>424</sup> *Id.* at 54.

<sup>425</sup> *Id.*

<sup>426</sup> *Id.* at 54-55.

<sup>427</sup> See *id.* at 55.

<sup>428</sup> *Id.* at 55-56.

<sup>429</sup> See Asbjorn Eide, *Economic and Social Rights*, in HUMAN RIGHTS: CONCEPT AND STANDARDS, *supra* note 89, at 109.

political, social, and economic benefits.<sup>430</sup> Experts also asserted that rights do not lose their human character because they are not justiciable.<sup>431</sup>

Utilizing some of the above arguments, the constitutionalism of the new post-socialist democracies tried to resolve the problem of protection of these rights in accordance with three different doctrines. The first doctrine claims that very few economic and social rights are fully enforceable; others have a programmatic character which identifies the goals of the state's activity.<sup>432</sup> The second doctrine maintains that constitutions should guarantee socio-economic rights, but the scope of protection should be decided by legislatures. Within the scope determined by law, these rights may be claimed in court. The third doctrine seems to impose on the government the performance of duties of an economic and social nature, but in fact recognizes that these obligations have a political rather than legal character.<sup>433</sup> In most of the new democracies, the legislatures attempted to blend all these concepts; the courts, however, predominantly followed the approach of the third doctrine and declared that these rights are not judicially enforceable and governments not performing in accordance with the voters' expectations may be held politically accountable.<sup>434</sup>

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<sup>430</sup> Wojciech Sadurski, *Myslenie Konstytucyjne: Prawa Drugiej Kategorii* [Constitutional Thinking: The Second Rank Rights], *Kultura* [Culture], Oct. 3, 1994, at 230.

<sup>431</sup> Eide, *supra* note 429, at 112.

<sup>432</sup> Several examples illustrate this doctrine. Some constitutional provisions are fully enforceable. *E.g.*, UKR. CONST. arts. 43, 44 (prohibiting the use of forced labor and granting the employed the right to strike); RUSS. CONST. art. 43, § 4 (providing that general basic education is compulsory). Other statements describe only goals of the states. *E.g.*, GEOR. CONST. art. 30 (declaring the State's obligation to promote the development of free enterprise and competition.); BELR. CONST. art. 21 (making the protection of the rights and freedoms of citizens the "supreme goal" of the State).

<sup>433</sup> The approaches of the second and third doctrines are reflected in several constitutional provisions. For example, the Ukrainian Constitution confirms that "[e]veryone who is employed has the right to rest," but specifies that "[t]he maximum number of working hours, the minimum duration of rest and of paid annual vacation, days off and holidays as well as other conditions for exercising this right, are determined by law." UKR. CONST. art. 45, *translated in* 19 CONSTITUTIONS, *supra* note 5. In these cases, the limits of enforcement of constitutionally guaranteed rights are determined by implementing laws and the justiciability of these rights are determined by the courts. Some statements identify the commitments of the government. *E.g.*, AZER. CONST. art. 41, *translated in* 1 CONSTITUTIONS, *supra* note 5 ("The State, acting on the basis of various forms of property, implements necessary measures to promote the development of all aspects of health services . . ."); *id.* art. 32 ("Family and marriage are under the protection of the State."). Although the governments might be politically responsible for the fulfillment of the goals affirmed by the constitutions, the state's obligations are legally unenforceable.

<sup>434</sup> See ANNA LUDWIKOWSKA, *SADOWNICTWO KONSTYTUCYJNE W EUROPIE*

The old Latin American constitutions varied significantly in their approach to the protection of socio-economic rights.<sup>435</sup> In the second and third decades of the nineteenth century, the attitude of the drafters began to change and some constitutions, such as the 1925 Constitution of Chile and the 1946 Constitution of Brazil, provided more extensive protection of these rights.

Socio-economic rights are also covered by the newly adopted or amended constitutions of Latin America. Usually they are not well-organized or listed separately but are blended with personal, political, and due process rights. However, similar to the new post-socialist states' approach, the constitutional provisions on these rights either have a predominantly declaratory character, or leave the determination of the scope of protection for the laws. The drafters' reluctance to impose too many positive obligations for the state is especially perceptive with regard to work-related rights, which are at the center of the discussion on the affordable level of constitutionalization of socio-economic rights in Latin America.

Most often the drafters attempted to follow the protection offered by Article 6 of the International Covenant on Economic, Social and Cultural Rights, which cautiously states that the general right to work "includes" some derivative rights, such as "the right of everyone to the opportunity to gain his living by work" and "the right to freely choose and accept work."<sup>436</sup> In practice, the levels of state protection vary. The minimum standard is usually limited to access to the job market.<sup>437</sup> More extended systems of protection

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SRODKOWOSCHODNIEJ [Constitutional Courts in East-Central Europe] 154 (1997).

<sup>435</sup> For example, following the prevailing trend in U.S. constitutionalism, the 1853 Argentinean Constitution did not protect socio-economic rights. The Constitution of Mexico, adopted in 1917, guaranteed relatively few socio-economic rights. In contrast, the 1871 Costa Rican Constitution had a separate section, "Concerning Social Guarantees," with fourteen articles covering employment-related rights, COSTA RICA CONST. of 1871, tit. III, § 3, *translated in* THE CONSTITUTIONS OF THE AMERICAS, *supra* note 85, at 208-09, while Title III of the 1886 Constitution of Colombia, "Civil Rights and Social Guarantees," referred to the social obligations of the state and covered labor-oriented rights, COLOM. CONST. tit. III.

<sup>436</sup> International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, art. 6, 993 U.N.T.S. 3, 6 (*entered into force* Jan. 3, 1976). This approach is reflected by most of the Latin American constitutions although sometimes the difference is not clearly expressed. For example, the 1994 Argentinean Constitution does not refer explicitly to the "right to access work" but states, "Labor in its diverse forms shall enjoy the protection of the law." ARG. CONST. art. 14 bis, *translated in* 1 CONSTITUTIONS, *supra* note 5. The Constitution does not guarantee work but focuses on derivative rights, such as "dignified and equitable working conditions," "a limited working day," "fair remuneration," "adjustable minimum working wages," and "equal pay for equal work." *Id.*

<sup>437</sup> Ashbjorn Eide wrote with regard to the right to employment:



include insurance programs paid for jointly by workers and employers. The most developed arrangements of the welfare states include obligatory and comprehensive programs with coverage for disability, unemployment, old age, child allowances, and pregnancy leaves.<sup>438</sup>

Among several examples, the Argentinean model falls between these standards of protection. The state does not offer any general protection against unemployment. Coming closer to the concept of social management, the Constitution just lists such organizational schemes as the right of workers to share profits of enterprises, collaborative management, protection against arbitrary discharge, free and democratic organization of trade unions, and permanence of public employment.<sup>439</sup> The Constitution guarantees the right of trade unions to collective bargaining, the right to conciliation and arbitration, the right to strike, and the right to secure employment for the unions' representatives.<sup>440</sup> While it guarantees "comprehensive and unwaivable" social benefits, it leaves the explanation of terms such as "compulsory social security," "adjustable retirement pay and pensions," "full protection for the family," and "protection of the welfare of the family" to specific statutory regulations.<sup>441</sup>

Colombian constitutionalism shows a stronger tendency to leave the power to regulate work-related rights to the legislature. The Constitution imposes upon the Congress the obligation to pass a labor statute which would further guarantee:

Equality of opportunity for workers; minimum essential and flexible remuneration proportional to the amount and quality of work; stability in employment; irrevocability of minimum benefits established in labor regulations; options to negotiate about and reconcile uncertain and arguable rights; a situation

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No such right exists, however, nor would it be possible to implement such a right, unless other human rights were intolerably restricted. It would, at the extreme, imply forced labour. When states under Article 6 of the International Covenant on Economic, Social and Cultural Rights recognize the right to work, this includes 'the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts.'

Eide, *supra* note 429, at 144.

<sup>438</sup> *Id.* at 148.

<sup>439</sup> ARG. CONST. art. 14.

<sup>440</sup> *Id.*

<sup>441</sup> *Id.*

more favorable to the worker in case of doubt in the application and interpretation of the formal bases of the law; the primacy of facts over established formalities in issues of labor relations; guarantees to social security, training, instruction, and necessary rest; special protection of women, mothers, and minor-age workers.<sup>442</sup>

The drafters of the Peruvian Constitution followed a mixed approach. The Constitution's provisions on social and economic rights are lengthy but they cover relatively few rights; instead, these rights are singled out from political and social rights and placed in a separate chapter.<sup>443</sup> Most of the provisions on economic and social rights have a declaratory character. Moreover, the state's activities are supposed to supplement community or individual efforts.<sup>444</sup>

With regard to the right to work, the Peruvian Constitution does not clearly make the routine distinction between the right to work and the free choice of occupation and profession.<sup>445</sup> It provides declaratory statements that "[w]ork is a duty and a right" and that the state recognizes diverse forms of work, protects the workers' dignity, and encourages productive employment, and vocational training.<sup>446</sup>

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<sup>442</sup> COLOM. CONST. art. 53, *translated in* 4 CONSTITUTIONS, *supra* note 5. The right to collective bargaining and the right to strike are also guaranteed, except in the case of essential public services defined by the legislature. *Id.* arts. 39, 56. The Constitution provides for the establishment of a permanent commission composed of employer, worker, and government representatives in order to facilitate the settlement of labor disputes, *id.* art. 56, and confirms the right of workers and employers to establish trade unions without the intervention of the state, *id.* art. 39.

Despite these formal guarantees, the Colombian government was unable to give sufficient protection to trade union activists, who were exposed to numerous acts of harassment, including assassinations. *Genocide Against the Central Union of Colombian Workers [CUT] Continues*, May 2, 2002, *available at* <http://www.colombiasupport.net/cutgenocide.html>. In 2002, the killings of trade union leaders became so frequent human rights organizations reported that these events escalated to the level of genocide. *Id.*

<sup>443</sup> PERU CONST. tit. I, ch. II (Concerning Social and Economic Rights).

<sup>444</sup> For example, Peru's Constitution states that "[t]he community and the State are especially mindful to protect the child, the adolescent, the mother, and the elderly when they are dependent. The State also protects the family and encourages marriage." *Id.* art. 4, *translated in* 14 CONSTITUTIONS, *supra* note 5. More specific regulations of marital unions, such as separations and divorces, are left to statutory laws. *See id.*

<sup>445</sup> *Compare id.*, with UDHR, *supra* note 248, art. 23.

<sup>446</sup> PERU CONST. arts. 22, 23, *translated in* 14 CONSTITUTIONS, *supra* note 5. Other employment-related rights, such as the right to minimum wage, just remuneration, social benefits, and paid vacation are confirmed but not specifically regulated by the Constitution; the

The new post-socialist constitutions follow the approach of the Latin American states and usually do not promise more than access to jobs. There are, however, exceptions. For example, the lists of economic and social rights in the Turkmen and Uzbek Constitutions are much shorter than in the other constitutions of the former Soviet republics.<sup>447</sup> The reduction of the list of economic and social rights seemed to justify the intention of the drafters to grant at least some of them full constitutional protection. However, reversing the prevailing position of the post-socialist doctrine, every person is not only guaranteed the right to choose a profession or job, but is granted the right to work. Given the low level of economic development in these countries, the implementation of these promises would impose unbearable obligations on the states.

In sum, the similarities in the approaches to the constitutionalization of socio-economic rights in both regions are remarkable. Sharing many economic and social problems, the constitutional drafters in Latin America and post-socialist states show some ambivalent reactions. On the one hand, they share sensitivity to the possibility that social and economic rights might be treated differently than political rights and citizens' freedoms; on the other hand, they feel uncomfortable promising something that cannot be delivered. As a result they produced a constitutional language which to some extent still gives the provisions on socio-economic rights a window dressing character.

### *G. Duties*

Socialist constitutions proclaimed that the protection of rights and freedoms is inseparable from the performance of duties. The inclination of post-socialist constitutionalism to play down the role of duties is discernible in all countries under examination. In very few countries, the constitutions preserved separate chapters on citizens' obligations.<sup>448</sup> In some states, the drafters purged the constitutional texts entirely of citizens' duties and decided to impose

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scope of these rights may be determined by agreements between workers and employers or by law. *Id.* arts. 24, 25. Similarly, the law grants the worker "adequate protection against arbitrary dismissal," but the Constitution does not explain what the term "adequate" means. *Id.* art. 27. The Constitution more specifically guarantees the ordinary workday of eight hours and the average maximum workweek of forty-eight hours. *Id.* art. 25. The last two articles of the chapter recognize the right to collective bargaining; the right to strike, limited by national interest, and the right of workers to participate in business profits. *Id.* arts. 28, 29.

<sup>447</sup> See TURKM. CONST. arts. 31-36; UZB. CONST. ch. 9 (consisting of seven articles).

<sup>448</sup> See, e.g., POL. CONST. ch. II.

obligations only on the state's agencies; in others, rights are not linked to the fulfillment of obligations<sup>449</sup> and are reduced to several main constitutionalized obligations: defense of the state; respect for fiscal duties; and respect for the Constitution, the laws, the environment, and the rights and freedoms of other citizens.

While most Latin American constitutions clearly focus on rights and freedoms, some follow the socialist approach, attempting to find a balance between citizens' rights and obligations. For example, the Colombian Constitution states that "[t]he exercise of rights and liberties recognized in this Constitution implies responsibilities."<sup>450</sup> It presents a long list of citizens' duties and duties assigned to everyone portrayed in a programmatic fashion, which essentially precludes any sensible enforcement of these social obligations.

## *H. Judicial Enforcement of Human Rights*

### *1. Constitutional Courts in the Region of Former Soviet Dominance*

Marxist-Leninist jurisprudence rejected the doctrine of separation of powers and the need for judicial enforcement of the constitution. Socialists allocated state functions to three governmental authorities (legislature, executive, and judiciary), but assumed that these segments of the socialist state worked under the leadership of the party.<sup>451</sup> The branches of government were not separated and by no means equal. The supremacy of the legislative bodies was recognized as the fundamental premise of socialist legal theory. Lenin claimed, "[t]he representation of the people is a nullity if it does not have full

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<sup>449</sup> The remnants of the old-fashion socialist approach still can be found in the Ukrainian Constitution: "Every person has the right to free development of his or her personality if the rights and freedoms of other persons are not violated thereby, and has duties before the society in which the free and comprehensive development of his or her personality is ensured." UKR. CONST. art. 23, *translated in* 19 CONSTITUTIONS, *supra* note 5.

<sup>450</sup> COLOM. CONST. art. 95, *translated in* 4 CONSTITUTIONS, *supra* note 5.

<sup>451</sup> See generally GRAEME GILL, THE RULES OF THE COMMUNIST PARTY OF THE SOVIET UNION 1-71 (1988). As the Communist Party of the Soviet Union stated in 1986, "The Communist Party . . . is the militant, tried-and-tested vanguard of the Soviet people, which unites on a voluntary basis the most advanced, conscious part of the working class, Kolkhoz peasantry and the intelligentsia of the USSR." Rules of the Communist Party of the Soviet Union (adopted at the XXVII Congress of the Communist Party of the Soviet Union, Feb.-Mar. 1986), GILL, *supra*, at 228.

power."<sup>452</sup> Thus, the courts, being inferior institutions, could not nullify the acts of superior legislative bodies. Traditional socialist jurisprudence assumed that an individual who believed that his constitutional rights had been violated could file a complaint in the executive branch supervising the office blamed for the violation or in the appropriate office of the procurator.<sup>453</sup> Socialist constitutionalism claimed that in the mature socialist state the administration could not be "set against" individuals.<sup>454</sup> In accordance with Trotsky's logic, "the workers could not defend themselves against the workers."<sup>455</sup> The institution of "bourgeois judicial review" was criticized as manipulative and instrumental in the hands of owners of big capital. Andrei Vyshinsky wrote:

Every sort of statute (in bourgeois countries) is considered as having force until it occurs to some private person or capitalist enterprise to file a petition in court to have it, or a separate paragraph of it, declared unconstitutional. Naturally this right is broadly used by monopolist cliques of exploiters to obtain a declaration of "unconstitutionality" as to laws running counter to their interests.<sup>456</sup>

In the late 1950s, the attitude toward judicial control of administrative acts began to change in the socialist countries. The right of individuals to challenge the legality of administrative decisions was introduced by statutes and confirmed by constitutional amendments in Yugoslavia in 1952,<sup>457</sup> Hungary in

<sup>452</sup> TEORIA PANSTWA SOCIALISTYCZNEGO [Theory of the Socialist State] 201 (N.P. Farbierow ed., 1976).

<sup>453</sup> U.S.S.R. CONST. art. 164 (1977).

<sup>454</sup> J. Letowski, *Administracja i Obywatele w PRL* [Administration and Citizens in Polish Peoples' Republic], 7 PANSTWO I PRAWO [State and Law] 52-60 (1984).

<sup>455</sup> SAMUEL HENDEL, *THE SOVIET CRUCIBLE: THE SOVIET SYSTEM IN THEORY AND PRACTICE* 94 (5th ed. 1980).

<sup>456</sup> Vyshinsky, *supra* note 159, at 339-40. Other socialist theorists also widely criticized the institution of judicial review. In Poland, Stefan Rozmaryn wrote: "The constitutional control of statutes by extra-parliamentary bodies, particularly judicial and quasi-judicial, is a reactionary institution and because of that, there is no room for it either in a socialist State or in a State of people's democracy, which trusts the people's justice and the will of the people." *Kontrola Sprawiedliwosci Ustaw* [Control of Legality of the Laws], 11-12 PANSTWO I PRAWO [State and Law] 866 (1946).

<sup>457</sup> See Ludwikowski, *supra* note 88, at 89-108 (commenting on the development of judicial review in socialist states). See generally ANNA LUDWIKOWSKA, *SADOWNICTWO KONSTYTUCYJNE W EUROPIE SRODKOWO-WSCHODNIEJ* [Judicial Review in East-Central Europe] (2002) (offering an analysis of the system of judicial review in socialist states).

1957,<sup>458</sup> Romania in 1967,<sup>459</sup> and Bulgaria in 1970.<sup>460</sup> Poland established the Supreme Administrative Court in 1980;<sup>461</sup> in 1985, it established the Constitutional Tribunal, which was granted the right to review sub-statutory acts (orders, ordinances, and instructions) and a limited right to review statutory laws.<sup>462</sup> The Tribunal began to review cases as of January 1, 1986.<sup>463</sup>

After the fall of communism, judicial review became one of the greatest novelties of post-socialist constitutionalism. It has been constitutionalized in all post-socialist democracies in transition except Turkmenistan. Predictably, the so-called American decentralized model, rooted in the concept of constitutional supremacy and the *stare decisis* principle, did not attract the drafters of the new constitutions, who preferred to experiment with the centralized or Austrian model, which reserves the right of constitutional review to one special judicial organ,<sup>464</sup> or with the French preventive model of review.<sup>465</sup> Although the tendency to adopt the well-tested European models is common, significant discrepancies can be found in the selection of justices and the scope of review by courts.

Most of the post-socialist states decided that both legislative and executive organs should cooperate in the selection of justices, yet the competence of these organs varies. In Hungary, the appointing functions were reserved exclusively for the legislatures.<sup>466</sup> In Russia, the president nominates candidates for appointment by the Federation Council (the federal component of parliament).<sup>467</sup> This model was adopted by Kyrgyzstan and Tajikistan where justices are elected and removed by parliament upon the motion of the president of the republic.<sup>468</sup> In other countries, the appointing prerogatives were distributed in a proportionate manner among several organs. For

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<sup>458</sup> See Ludwikowski, *supra* note 88, at 89-108.

<sup>459</sup> *Id.*

<sup>460</sup> *Id.*

<sup>461</sup> *Id.*

<sup>462</sup> *Id.*

<sup>463</sup> *Id.*

<sup>464</sup> See Ludwikowski, *supra* note 16, at 50-51 (examining the reasons for the rejection of the American model).

<sup>465</sup> The French *Conseil Constitutionnel* must review organic laws and other laws if submitted before promulgation by the president of the republic, the prime minister, the president of one of the parliamentary chambers, or by one of the sixty members of the national assembly or senate. FR. CONST. art. 61.

<sup>466</sup> HUNG. CONST. art. 19, § 3(k).

<sup>467</sup> RUSS. CONST. art. 83.

<sup>468</sup> KYRG. CONST. art. 46, § 5; TAJ. CONST. art. 49, § 12.

example, Romania follows the French model and splits the power to appoint justices between the president and the two chambers of parliament, each having the right to choose one-third of the court's membership.<sup>469</sup> In 1995, the French system was also duplicated by Kazakhstan, which replaced the constitutional court with a constitutional council composed of seven members appointed for six years.<sup>470</sup> The president and two justices are appointed by the president of the republic; the remaining two justices are appointed by the chairpersons of the senate and the assembly (*majilis*).<sup>471</sup>

The scope of review by constitutional courts varies as well. All constitutional courts are vested with the right to control abstract acts submitted for the court's review, but only some of them have the right to institute this control preventively or before the acts are given legal force. Romania, following the French model, grants the constitutional court the exclusive right to preventively control laws.<sup>472</sup> In Poland, Estonia, and Hungary, the president, before signing a bill, may ask the constitutional court to give a judgment on its conformity with the constitution.<sup>473</sup> In Kazakhstan, the constitutional council reviews laws, if submitted before promulgation, and international treaties, if before ratification; determines the legality of elections and referenda; officially interprets the Constitution; and participates in the dismissal of the presidents due to illness or impeachment procedures.<sup>474</sup> In Tajikistan, the court also has the power to preventively review international agreements that have not entered into force.<sup>475</sup> The drafters of the constitutions in other post-socialist

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<sup>469</sup> ROM. CONST. art. 140.

<sup>470</sup> KAZ. CONST. art. 58, § 7, art. 71, §§ 1-3.

<sup>471</sup> Significant differences can also be found in the selection of justices in other former Soviet republics. In Uzbekistan, the Constitution vests in the parliament the right to select judges of the constitutional court, supreme court and higher arbitration court. UZB. CONST. art. 78, §§ 12-14. The constitutional court of Azerbaijan also consists of nine judges appointed by the parliament on the basis of recommendation by the president of the republic. AZER. CONST. art. 130.

<sup>472</sup> ROM. CONST. art. 144.

<sup>473</sup> POL. CONST. art. 133, § 2; EST. CONST. art. 107; HUNG. CONST. art. 26.

<sup>474</sup> KAZ. CONST. arts. 47, 72.

<sup>475</sup> The preventative right to review the consistency between international treaties and the constitution is vested in the constitutional courts by the constitutions or by the implementing laws of Bulgaria, BULG. CONST. art. 149, § 1 (4), Tajikistan, TAJ. CONST. art. 89, and Russia, RUSS. CONST. art. 125, § 2(d). The Czech Constitution allows the constitutional court to disqualify a law for its inconsistency with international agreements. CZECH REP. CONST. art. 87, § 2. In Poland, the court adjudicates on the conformity of international agreements to the constitution and all other legal acts to international agreements. POL. CONST. art. 188, § 1. A judgment of the Polish constitutional court on the nonconformity of the legal act to an

states took the position that preventive review interferes with the legislative process and stripped their constitutional courts of the right to review laws before promulgation.

The constitutional drafters in several new democracies tried to incorporate into the post-socialist model of judicial review elements of concrete control, which can be triggered by actual legal controversy between the parties. This type of control brings regular courts into the process of review. Judges, who are bound by the constitution and the statutes, have a positive obligation to apply legal acts that are constitutional in their decisions.<sup>476</sup> They may not be allowed to invalidate the acts which they recognize as illegal or unconstitutional, but they must apply only those norms that are compatible with the constitution and statutes.<sup>477</sup> A judge can disqualify a sub-statutory act (regulation, administrative decision, ordinance) as a valid basis for his decision, but being bound by the statute, he can only stay the proceeding and request the constitutional court review the constitutionality of the challenged law.<sup>478</sup>

In some new democracies, the decisions of the constitutional courts on the constitutionality of the law are final and the acts recognized as unconstitutional are void from the day of the enactment of the ruling.<sup>479</sup> In other countries, only the rulings on the legality of the sub-statutory laws are binding, but the decisions on the constitutionality of statutes can be overruled by a qualified majority of two-thirds of the legislative chamber. The Kazakh Constitution allows the president of the Republic to veto the ruling of the constitutional council. The veto can be overruled by two-thirds of the council's votes.<sup>480</sup>

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international agreement is a basis for re-opening proceedings if the legal act was based on a legally effective judgment of a court, or a final administrative decision was issued. *Id.* art. 190, § 4. In Lithuania, the parliament has the final decision in cases when the constitutional court has ruled on the conformity of international agreements with the constitution. LITH. CONST. art. 107. The constitutions of Georgia and Armenia prohibit the ratification of international agreements challenged in the constitutional court prior to the court's decision. *See, e.g.*, GEOR. CONST. art. 65, § 4. The Azerbaijani court determines the correspondence of international agreements with both the constitution and laws of the republic. AZER. CONST. art. 130, § III(b).

<sup>476</sup> *See, e.g.*, POL. CONST. art. 178, § 1.

<sup>477</sup> *See, e.g.*, CZECH. REP. CONST. art. 95.

<sup>478</sup> *Id.*

<sup>479</sup> The decisions of the Armenian, ARM. CONST. art. 102, Azerbaijani, AZER. CONST. art. 130, and Georgian, GEOR. CONST. art. 89, § 2, constitutional courts are final, and the acts recognized as unconstitutional are void from the time of publication of the decision.

<sup>480</sup> KAZ. CONST. art. 73, § 4.



A controversial issue which arose during the drafting of the new constitutions was the extension of the constitutional courts' jurisdiction over the right to hear individual complaints. On the one hand, the constitutional complaint gives private persons direct access to the constitutional courts, and as such, is one of the most democratic features of judicial review. On the other hand, its introduction overburdened numerous European constitutional courts, comprising over ninety percent of their cases. Until recently, this institution made slow but steady inroads in the practice of the new European constitutional courts.<sup>481</sup>

Besides functioning as the organs of judicial review of the constitutionality of laws, the constitutional courts in the new post-communist democracies play several other roles. Some constitutions vest in the constitutional courts the right to interpret the constitution.<sup>482</sup> Some constitutional courts are allowed to decide disputes between central and local governments,<sup>483</sup> some may participate in the impeachment process,<sup>484</sup> and still others may rule on the legality of elections and referenda.<sup>485</sup>

## 2. *Development of Judicial Review in Latin America*

The early experiments of the Latin American countries with instruments of judicial enforcement of the constitution were difficult. On the one hand, the colonial elites in the predominantly Spanish and Portuguese territories of Central and South America carefully watched the legal developments in the old continent. In the nineteenth century, Europe, with its philosophy of Enlightenment and newly drafted, Napoleonic era legal codes, was dragging Latin America into the family of civil law countries.<sup>486</sup> On the other hand, Europeans, who did not begin seriously to experiment with judicial review

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<sup>481</sup> E.g., CZECH REP. CONST. art. 7, § 1(d); POL. CONST. art. 79, § 1.

<sup>482</sup> E.g., BULG. CONST. art. 149, § 1(1) (permitting the constitutional court to interpret the constitution); KAZ. CONST. art. 72, § 1(4) (permitting the constitutional council to interpret the constitution).

<sup>483</sup> E.g., RUSS. CONST. art. 125, § 3 (allowing the court to resolve disputes on a horizontal level within federal and state administrative structures and on a vertical level between federal and state organs of power).

<sup>484</sup> E.g., CZECH REP. CONST. art. 87, § 1(g). Certain constitutional courts also may de-legalize political groupings and parties. E.g., ROM. CONST. art. 144, § j.

<sup>485</sup> E.g., ALB. CONST. art. 131, §§ g, h. Some constitutional courts even have legislative initiative. E.g., RUSS. CONST. art. 104, § 1.

<sup>486</sup> Robert C. Means, *Codification in Latin America: The Colombian Commercial Code of 1853*, 52 TEX. L. REV. 18, 21-22 (1973).

before the second decade of the twentieth century,<sup>487</sup> could hardly recommend any models of judicial enforcement of the constitution.

Early experiments in Latin American countries with their own instruments of constitutional enforcement were unsuccessful. Robert Barker wrote:

In 1836, Mexico adopted a new constitution which established a fourth branch of government, called the Supremo Poder Conservador, a commission whose duty it was to safeguard the constitution. It was empowered to, *inter alia*, nullify acts of the executive, legislative, and judicial branches, which were contrary to the constitution. The Supremo Poder Conservador acted on only four occasions, none of which involved constitutional matters. After five years, it was abolished.<sup>488</sup>

Disappointed in their own experiments and deprived of clear European traditions to follow, early Latin American leaders became determined to draw from the U.S. constitutional model. Encouraged by Alexis de Tocqueville's writings, they borrowed the decentralized model of judicial review, disregarding concerns about its adaptability in countries with a civil law system. Allan Brewer-Carías noted that, following Tocqueville's *Democracy in America*, the decentralized U.S. system of review became particularly popular in the federal states of Latin America.<sup>489</sup> The system was tested in Mexico in 1857, Venezuela in 1858, Argentina in 1860, Brazil in 1890, as well as in other states

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<sup>487</sup> Europeans followed the so-called Austrian "'centralized' type of control [that] confines the power of review to one single judicial organ." CAPPELLETTI, *supra* note 13, at 46-47. This model is usually contrasted with the United States' "decentralized" model that vests the power of control in all judicial organs. *Id.* at 46. The Austrian model was first tested in 1867 and was adopted in the Austrian Constitution of October 1, 1920, as amended in 1929. *Id.* at 46-47. The power to review the constitutionality of laws was vested in the constitutional tribunal, but the power to review the legality of administrative actions was vested in the Supreme Administrative Court. Following the Austrian experience, judicial control of constitutionality was adopted by the Czechoslovakian Constitution of 1920; in 1921, the Supreme Administrative Tribunal was formed in Poland. See ZDZISŁAW CZESZEJKO-SOCHACKI, TRYBUNAŁ KONSTITUCYJNY W PRL [The Constitutional Tribunal in the Polish People's Republic] 15-17 (1986); see also Marek Wierzbowski & Stephen C. McCaffrey, 8 MODERN LEGAL SYSTEMS CYCLOPEDIA 159 (1985); Barker, *supra* note 21, at 906.

<sup>488</sup> Barker, *supra* note 21, at 906.

<sup>489</sup> See BREWER-CARIÁS, *supra* note 29, at 71, 156.

with brief or no federal experience, such as Colombia in 1850 and the Dominican Republic in 1844.<sup>490</sup>

The adoption of the decentralized model of review in civil law countries proved to be a formidable challenge for the Latin American region. The U.S. model, vesting all regular courts with the power to nullify an unconstitutional law and rooted in the concept of constitutional supremacy, assumes that the validity of a court decision could be extended to other cases through the principle of *stare decisis*. In civil law countries, in which judges are only expected to apply law, but are not allowed to formulate legal rules or interpret them creatively, the law disqualified by some courts could easily be applied by others. This could result in the chaotic application of the law and a lack of certainty as to the meaning of the law.

Latin American constitutionalism tried to accommodate the decentralized model of judicial review in the civil law fabric of the legal system, testing several devices. In the second half of the nineteenth century, Latin American judges were eager to borrow from early Greek experiments with the decentralized system. In 1847, the Greek Supreme Court ruled that it has the power to review the constitutionality of all legal acts.<sup>491</sup> The Court did not claim that it might nullify legislative acts, but insisted that judges have to apply only laws which are constitutional.<sup>492</sup> The approach allowed the courts to signal inconsistencies in the law without violating the well-recognized European principle of parliamentary supremacy. The concept that the courts have the right to declare the law voidable but not void has become an important feature of Latin American jurisprudence's attempt to avoid the situation in which some courts could nullify the law and others could still recognize its constitutionality.

The second device was supposed to blend the Latin American civil law traditions with some—namely, precedential—features of the common law system. The idea was borrowed from the Spanish concept known as *doctrina legal* (legal doctrine), which was a major deviation from the traditional assumption that the fabric of the civil law is statutory and non-precedential.<sup>493</sup>

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<sup>490</sup> *Id.* at 156.

<sup>491</sup> *See id.* In 1871 and 1879, however, the Greek Supreme Court reversed the 1847 decision, holding that it "has the power not to apply [a statute] in the case" only when the statute "is in evident contraction with a superior provision of the Constitution." *Id.* (quoting Greek Supreme Court Judgments No. 18 (1871) and No. 23 (1879)).

<sup>492</sup> *See id.*

<sup>493</sup> L. Neville Brown, *The Sources of Spanish Civil Law*, 5 INT'L & COMP. L.Q. 364, 364-70 (1956).

The Spanish courts worked out the concept of *doctrina legal* while addressing the problem of gaps in the statutory laws. The judges, admitting that legislation might not provide answers regulating all controversies, began to assert that general principles of law could also be found in *opinio juris* or in *jurisprudencia*, the high court's opinions.<sup>494</sup> Following this argument, the Spanish Supreme Court, in a decision on November 4, 1838, permitted cassation on the basis that the lower court did not respect the legal doctrine established by the higher courts.<sup>495</sup>

At the end of the nineteenth century, the concept of legal doctrine was used by Latin American jurists. Although Latin American jurisprudence had never officially recognized the principle of *stare decisis*, it authorized the higher courts to allow appeals against judges' decisions which did not respect concordant and recognized doctrinal interpretation of the law. In Colombia, for example, the violation of a legal doctrine could be invoked against a decision that did not follow three uniform decisions of the Supreme Court;<sup>496</sup> in Mexico the *jurisprudencia* could be established by five consecutive decisions of the Supreme Court or the collegiate circuit courts.<sup>497</sup>

The application of legal doctrine in the Latin American countries has never been sufficiently clear. The Colombian Law of 1896, introducing this concept, referred to the "probable doctrine";<sup>498</sup> the Mexican constitutional amendment of 1967 referred to precedent, but left its definition to the law.<sup>499</sup> The jurists also confirmed that poorly organized court reports expose the judges to the risk of violation of *jurisprudencia* for mere lack of information.<sup>500</sup>

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<sup>494</sup> *Id.*

<sup>495</sup> Subsequently, the right to formulate the "legal doctrine" through "the established case law" was reserved exclusively to the Supreme Court. *See id.* (examining this decision and the decision of December 10, 1894).

<sup>496</sup> "Three uniform decisions given by the Supreme Court in cassation on the same point of law constitute probable *doctrine*, and the judges should apply them in analogous cases, however the Supreme Court may change *doctrine* if it judges the previous decisions to have been erroneous." SEYMOUR W. WURFEL, *FOREIGN ENTERPRISE IN COLOMBIA: LAWS & POLICIES* 286-87 (1965) (quoting Colombia Law No. 169, art. IV (1896)).

<sup>497</sup> BREWER-CARÍAS, *supra* note 29, at 167.

<sup>498</sup> RICHARD D. BARKER, *JUDICIAL REVIEW IN MEXICO: A STUDY OF THE AMPARO SUIT* 251 (1971).

<sup>499</sup> *See* MEX. CONST. art. 107, § XIII (amended 1967).

<sup>500</sup> Seymour Wurfel observed:

The Judicial Gazette [*Gaceta Judicial*], published since 1887, prints the full text of the decisions of all chambers of the Supreme Court and other material as ordered by the court. This is published somewhat irregularly in periodic form and is not itself converted into bound volume form. There is nothing in

The doctrine of *jurisprudencia* and the concept of law that can be declared voidable but not void were both incorporated into proceedings of *amparo* in some of the Latin American regions. Robert Barker wrote:

*Jurisprudencia* (jurisprudence), in Mexico as elsewhere, is susceptible to a wide variety of definitions. We have seen, however, that in *amparo* the term carries the special, technical meaning of obligatory precedent. Although the Supreme Court has been assigned the power to establish such precedents in all the *amparo* legislation since 1909, explicit constitutional recognition of this function was lacking until the amendments of 1950-51 were adopted.<sup>501</sup>

The *amparo* proceeding in Mexico has been constitutionalized in Article 107 of the 1917 Constitution.<sup>502</sup> It provides for the protection by courts of any person's constitutional rights violated either by the final court's decision or by acts of public authorities.<sup>503</sup> According to a decentralized system of review, a proceeding of *amparo* vests the right to review the violation and provide protection in all federal courts.<sup>504</sup> The petitioner for a writ of *amparo* may challenge the final court's decisions in criminal and civil cases and administrative actions.<sup>505</sup> Decisions in direct *amparo* rendered by district judges are reviewable by the supreme court; the decisions of a full circuit court, however, may not be appealed with the exception of challenges against the constitution-

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Colombia comparable to the various official reporter series of the respective states of the United States nor the West Publishing Company series of unofficial reports. There is no topical digest system and no case headnotes, except annotations to codes and texts by individual authors. . . . Official reporters of the Supreme Court or individual judges or lawyers, as a private enterprise, on occasion prepare digests of Supreme Court decisions for a period of years. These are not complete nor always consecutive. These works are known as *jurisprudencia*. They constitute the only readily available source of court decisions and are usually not current.

WURFEL, *supra* note 496, at 286-88.

<sup>501</sup> Barker, *supra* note 498, at 905-07.

<sup>502</sup> MEX. CONST. art. 107. It was confirmed in 1957 by the court in the *Angel Siri* case. See BREWER-CARIAS, *supra* note 29, at 162; see also G.R. CARRIO, ALGUNOS ASPECTOS DEL RECURSO DE AMPARO 9 (1959).

<sup>503</sup> MEX. CONST. art. 107, § V (amended 1968, 1976, 1987).

<sup>504</sup> *Id.* art. 107, § VIII (amended 1968, 1976, 1987).

<sup>505</sup> *Id.* art. 107, § V.

ality of a law or interpretation of the Constitution.<sup>506</sup> Thus, the regular courts were left with the right to identify the voidability of laws and the Constitution imposed on the judges the duty to respect the supreme court's *jurisprudencia*.

Moving toward the classic U.S. decentralized model of review, some other Latin American states were less inclined to vest the right to declare a law void exclusively in the highest courts. In Argentina, the right of review exercised by all judges has been claimed by the Supreme Court, following arguments used by Marshall in *Marbury v. Madison*, and constitutionalized in the 1994 Constitution.<sup>507</sup> The Constitution clearly confirms that "the judge may declare the norm upon which the harmful act or omission is founded unconstitutional."<sup>508</sup> The harmful act can be challenged in an *amparo* action after the exhaustion of other judicial remedies for protection of a person's rights recognized by the supreme law of the country (the constitution, treaties, or statutory laws), and violated by public authorities or private individuals.<sup>509</sup> Complaints concerning violations of a collective nature may also be filed by consumer associations, organizations protecting the environment, or by the defender of the people. Through *amparo* proceedings, the interested parties may also ask the court to reveal the data collected on them and demand the information's suppression, rectification, confidentiality, or updating. When a person's physical liberty is in jeopardy, the person or anyone on his behalf may request a writ of *habeas corpus*; the petition will be reviewed by the court even in a state of siege.<sup>510</sup>

Some of the Latin American states, such as Mexico, exclusively use the writ of *amparo*; other countries single out a separate writ of *habeas corpus*; and still others supplement these remedies by additional actions, which blend the decentralized model of review with some features of European centralized or preventive models. The 1993 Peruvian Constitution illustrates the third

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<sup>506</sup> *Id.* art. 107, §§ VIII (amended 1968, 1976, 1987), IX (amended 1987).

<sup>507</sup> As Barker noted, the Argentinean Supreme Court declared an act of Congress unconstitutional for the first time in 1888. See Barker, *supra* note 21, at 12-14 (discussing the Supreme Court's decisions in *Municipalidad de la Capital v. Elortondo*, 33 Fallos de la Corte Suprema de Justicia de la Nación [fallos] 162 (1888)); see also H. QUIROGA LAVIE, DERECHO CONSTITUCIONAL 478 (1984).

<sup>508</sup> ARG. CONST. art. 43, translated in 1 CONSTITUTIONS, *supra* note 5; see also *id.* art. 116 (confirming that "[t]he Supreme Court of Justice and the lower courts of the Nation have jurisdiction over and decide all cases that deal with matters governed by the Constitution and the laws of the Nation, except as provided in clause 2 of article 75"); *id.* art. 75, § 12 (singling out the civil, commercial, penal, mining, labor, and social security codes).

<sup>509</sup> *Id.* art. 43.

<sup>510</sup> *Id.*

approach well. Title V on constitutional guarantees borrows from the U.S. diffused system and grants the Constitutional Court the right to initiate actions protecting constitutional rights and freedoms.<sup>511</sup> In addition, the Peruvian system follows the continental European model of centralized review and establishes the Constitutional Court as the supreme organ supervising adherence to the Constitution.<sup>512</sup>

The Constitution provides for six actions, which may be taken to protect the Constitution and constitutionally guaranteed rights.

1. The action of *habeas corpus* is an independent "concrete" proceeding instituted to protect a petitioner whose liberty or related constitutional rights have been violated or threatened by the acts or omissions of the authorities.<sup>513</sup>
2. The action of *habeas data* are initiated in protection of the right to privacy, honor and good reputation, and access to public information.<sup>514</sup>

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<sup>511</sup> PERU CONST. tit. V.

<sup>512</sup> As Brewer-Carías noted, the first constitutional court in Peru was established on the basis of the 1979 Constitution. See BREWER-CARÍAS, *supra* note 29, at 324. The Court was composed of nine judges, with a Congress, the executive, and the Supreme Court each appointing three. *Id.* The Court had a cassational jurisdiction with regard to the lower courts acting in *habeas corpus* and *amparo* proceedings and worked as a court of sole jurisdiction in abstract challenges against unconstitutional laws. *Id.* In proceedings initiated by privileged petitioners (abstract reviews), the decisions of the Court were final with regard to sub-statutory acts. *Id.* at 325. The statutes declared unconstitutional were submitted to the Congress. *Id.* If the legislative body did not amend the act in forty-five days, the challenged act became invalid.

The 1993 Constitution changed the composition of the constitutional courts and the scope of the review. The Court now is composed of seven members elected by the Congress and enjoying the same immunity and prerogatives as congressmen. PERU CONST. art. 201. Judges and prosecutors can be appointed to the constitutional court only if they quit their positions at least one year prior to election. *Id.* The court has sole jurisdiction in actions of unconstitutionality and appellate jurisdiction on the decisions of the common courts rejecting the petitions in actions of *habeas corpus*, *amparo*, *habeas data*, and actions of compliance. *Id.* art. 202, §§ 1, 2. The Court also decides jurisdictional conflicts and other cases specifically reserved for the Court by the laws. *Id.* art. 202, § 3. The decisions of the Court are final and become effective on the following day after their announcement. *Id.* art. 204. The decisions are not retroactive; they operate *ex nunc*, meaning that they have only prospective impact on persons' rights and duties. *Id.* The Constitution allows further appeal to international organizations or tribunals after exhaustion of all local remedies. *Id.* art. 205.

<sup>513</sup> PERU CONST. art. 200, § 1.

<sup>514</sup> *Id.* art. 200, § 3.

3. The action of *amparo* is a proceeding initiated to protect all other rights guaranteed by the Constitution.<sup>515</sup>
4. The action of unconstitutionality is an abstract type of review exercised by the Constitutional Court<sup>516</sup> upon the petition of the president of the republic, the public prosecutor of the republic, the defender of the people, twenty-five percent of congressmen, 5000 petitioning citizens, the presidents of regions, or professional colleges in the fields of their specialty.<sup>517</sup>
5. The popular action may be instituted against implementing regulations and administrative resolutions violating the Constitution and the laws.<sup>518</sup>
6. The action of compliance may be filed against any authority or administrative officer unwilling to respect the law or administrative acts.<sup>519</sup>

<sup>515</sup> *Id.* art. 200, § 2.

<sup>516</sup> The Constitutional Court has proven to be an active but also a controversial institution. In 1997, the three members of the Court ruled that President Fujimori's attempts to secure a third presidential term were unconstitutional. Human Rights Watch, *Elections in Peru: Democracy at Risk* (May 31, 2000), at <http://www.hrw.org/press/2000/05/oas0531.htm>. When the Court could not obtain the necessary quorum of six of seven judges, the three judges used their power of "decentralized" review and decided not to apply the challenged law allowing a new election. INTER-AMERICAN COMM'N ON HUMAN RIGHTS, *International Obligations: Peru and the Inter-American Human Rights System*, in SECOND REPORT ON THE SITUATION OF HUMAN RIGHTS IN PERU, ch. 3, n.9 (2000), at <http://www.cidh.org/countryrep/Peru2000en/chapter3.htm>. The subsequent removal of three judges by the Congress was challenged by the Inter-American Commission on Human Rights (IAHCR), which, on July 2, 1999, filed an application with the Inter-American Court on Human Rights. *Id.* ¶ 33. In the same month, the Inter-American Court decided that Peru should retry in civilian courts four Chileans accused and sentenced for terrorism by the military courts. See *Peru to Recognize Human Rights Court*, USA TODAY, Jan. 12, 2001, available at <http://www.usatoday.com/news/world/nwsfri01.htm>. In response, the Peruvian government "withdrew" the country's declaration recognizing the permanent jurisdiction of the Court. Abraham Lama, *Inter-American Court No Longer to Rule Here*, Committee to Free Lori Berenson (July 8, 1999, [http://www.freelori.org/news/99jul08\\_ips.html](http://www.freelori.org/news/99jul08_ips.html)). The Peruvian Constitutional Court reached the headlines again in 2003 when it recognized as unconstitutional only one of the four anti-terrorism decrees issued by former President Fujimori. The Court disregarded the decision of the IAHCR clearly recognizing the decrees as violating the international humanitarian law. Rhoda Berenson & Mark Berenson, *Peru's Constitutional Court Fails to Make Adequate Changes Needed to Comply with International Standards*, Committee to Free Lori Berenson (Jan. 7, 2003), <http://www.freelori.org/familyupdates/03jan07.html>.

<sup>517</sup> PERU CONST. art. 200, § 4.

<sup>518</sup> *Id.* art. 200, § 5.

<sup>519</sup> *Id.* art. 200, § 6.



The right to initiate these actions is not suspended in emergency situations.<sup>520</sup> The courts have discretion to decide whether restrictions imposed on constitutionally guaranteed rights and freedoms during emergency situations are proportional and reasonable.<sup>521</sup>

The 1988 Constitution of Brazil makes the Supreme Federal Tribunal the main organ of judicial review. The Tribunal decides, in abstract, direct actions of unconstitutionality challenging federal or state normative acts. The reviewing activity of the Tribunal may be triggered by the president of the republic, the executive committees of the chambers of parliament, a state governor, the procurator general, the Federal Council of the Brazilian Bar Association, a political party represented in the national Congress, a syndical confederation, or a national class entity.<sup>522</sup> Unlike the U.S. model,<sup>523</sup> the rulings of the Tribunal are not binding only on the parties to the controversy; they have an *erga omnes* character and have to be respected by "the rest of the Judiciary and the Executive."<sup>524</sup> Further, in the case of a declaration of unconstitutionality due to lack of measures to make a constitutional rule effective, the Tribunal shall notify the appropriate branch to remedy the situations.<sup>525</sup> The Tribunal also has jurisdiction in actions for writs of habeas corpus when the petitioner is the president or vice president of the republic, a deputy of the Congress, justice of the Tribunal, or the procurator-general.<sup>526</sup> The Tribunal moreover has jurisdiction in actions for writs of security<sup>527</sup> and habeas data against acts of the president, Congress, the Federal Tribunal of Accounts, the procurator-general, and the Tribunal itself.<sup>528</sup> Finally, the

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<sup>520</sup> *Id.* art. 200.

<sup>521</sup> *Id.*

<sup>522</sup> BRAZ. CONST. arts. 102, 103.

<sup>523</sup> As Justice Sutherland explained the U.S. "declaratory" model of review, the courts declare an unconstitutional law not applicable to the concrete controversy between the parties. *Mass. v. Mellon*, 262 U.S. 447, 488 (1923). See BREWER-CARÍAS, *supra* note 29, at 144-45.

<sup>524</sup> BRAZ. CONST. art. 102, § 2.

<sup>525</sup> *Id.* art. 103, § 2°.

<sup>526</sup> *Id.* art. 102, § I(d).

<sup>527</sup> Barker explains, "In 1934, Brazil established a new procedural remedy, the *mandato de sequestranca* (literally, writ of security), a summary proceeding to protect 'clear and certain rights' not protected by *habeas corpus*." Barker, *supra* note 21, at 910-11.

<sup>528</sup> *Id.*

Tribunal has jurisdiction in other constitutional actions<sup>529</sup> or in actions in response to a lower court's denial of appellate jurisdiction to the Tribunal.<sup>530</sup>

Several elements of the European model were also adopted in Colombia. First, following some of the features of the French judicial system, the Constitution established the Council of State, comprised of an uneven number of judges determined by law<sup>531</sup> elected for eight years,<sup>532</sup> as the supreme administrative and consultative body of the government.<sup>533</sup> Second, it constitutionalized the powers of the Superior Council of the Judicature, composed of the administrative and disciplinary chambers,<sup>534</sup> to administer the legal career, to select candidates for judicial positions, to monitor the activity and productivity of judicial authorities, to draft the budgetary bill, and to resolve jurisdictional conflicts.<sup>535</sup> Third, the Colombian Constitution vests the right of constitutional review in the Constitutional Court with an uneven number of judges elected by the senate for single terms of eight years from the candidates presented by the president of the republic, the Supreme Court, and the Council of State.<sup>536</sup>

The Constitution adopted a model that is a mixture of decentralized and centralized, preventive and *ex post facto* systems. The Constitutional Court has original jurisdiction to decide on the constitutionality of referenda and other instruments of plebiscitary democracy,<sup>537</sup> actions initiated to amend the Constitution,<sup>538</sup> adopted constitutional amendments,<sup>539</sup> statutory laws,<sup>540</sup> and governmental decrees.<sup>541</sup> In all these actions the initiative to activate the Court was reserved for public institutions and for citizens.<sup>542</sup> The Court also has appellate jurisdiction to revise the decisions of regular courts protecting the

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<sup>529</sup> Such actions are permitted when it is claimed that the appealed court decision "is contrary to a provision of the Constitution; declares a treaty or a federal law unconstitutional; upholds a law or act of local government challenged as violative of this Constitution." BRAZ. CONST. art. 102, § III, *translated in* 3 CONSTITUTIONS, *supra* note 5 (subsection numbers omitted).

<sup>530</sup> *See id.* art. 102, § I(1).

<sup>531</sup> COLOM. CONST. art. 236.

<sup>532</sup> *Id.* art. 233.

<sup>533</sup> *Id.* art. 237, §§ 1, 3.

<sup>534</sup> *Id.* art. 254.

<sup>535</sup> *Id.* art. 256.

<sup>536</sup> *Id.* art. 239.

<sup>537</sup> *Id.* art. 241, §§ 2, 3.

<sup>538</sup> *See id.* art. 241, § 8.

<sup>539</sup> *Id.* art. 241, § 1.

<sup>540</sup> *Id.* art. 241, § 4.

<sup>541</sup> *Id.* art. 241, §§ 5, 7.

<sup>542</sup> *Id.* art. 242, § 1.

constitutional rights of citizens.<sup>543</sup> Preventive review by the Court can be initiated on the petition of the government challenging the constitutionality of the bills.<sup>544</sup> The Court reviews the constitutionality of international treaties and implementing legislation.<sup>545</sup> Treaties should be submitted to the Court by the government and citizens may intervene in these actions by either defending or challenging the constitutionality of the treaties.<sup>546</sup> In all these actions, before taking a final decision on their constitutionality, the Court should give the acting organ the opportunity to amend or repeal the challenged instrument.<sup>547</sup> The Constitution makes the public defender responsible for the promotion of human rights and the supervision of the public system under their protection.<sup>548</sup> The public defender office is a part of the public ministry which is headed by the public prosecutor of the republic.<sup>549</sup>

In sum, judicial control of the constitutionality of the laws became a standard element of the reviewed constitutions. The states of both regions experimented with mixed systems of judicial review. It has to be noted, however, that even blending features of different models requires some consistency; it should not bring syncretic results, mixing features that can hardly be combined into a logical unity. The problem is most clearly visible in the Latin American states which attempted to insert concepts of precedent into a legal system founded on civil law traditions and marry elements of centralized and decentralized models.

The development of constitutional review in post-Soviet states took a different swing, as this region preferred to follow the European model of control and concentrate authority in a supreme court or in a constitutional tribunal. The post-Soviet region experienced problems ranging from extreme activism by justices on constitutional courts, who were accused of confusing judicial and political functions, to passivity and submission to the control and directives of the executive bodies.<sup>550</sup>

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<sup>543</sup> *Id.* art. 242, §§ 1, 2.

<sup>544</sup> *Id.* art. 241, § 8.

<sup>545</sup> *Id.* art. 241, § 10.

<sup>546</sup> *Id.*

<sup>547</sup> *Id.* art. 241.

<sup>548</sup> *Id.* art. 277, §§ 1, 2, 5, 6.

<sup>549</sup> *Id.* art. 275.

<sup>550</sup> The constitutional courts in several countries have been quickly recognized as formidable enemies by both the executive and the legislature branches. The political conflicts between these courts and the presidents in Belarus, Kazakhstan, and Russia (before Yeltsin's decision to dissolve Parliament in 1993) have been well documented. In Bulgaria and Romania, the constitutional challenges of almost all legislative acts became almost routine. On the other hand,

## VI. CONCLUSION

The main objective of this article is to expose similarities and differences in the constitutionalization of human rights and the possible lessons that Latin American and post-Soviet states can learn from their mutual experiences. The following summaries wrap up the above observations.

1. Latin American states and several republics of the former Soviet Union showed a predilection to adopt some features of the presidential system. This article aimed to determine whether such an adoption hampered the democratization process and contributed to the weak protection of human rights. The comparative analysis demonstrated no clear evidence that presidentialism as such is less conducive to the protection of democratic values and the rule of law than parliamentary or mixed systems. The countries of both regions adopted some features of the U.S. presidential system but deviated from the pure presidential model of governance toward authoritarianism. The research confirms that simply meddling with the prerogatives of governmental institutions is not a remedy for the problems faced by both regions. Without strengthening grassroots movements and components of civic societies and creating a well-balanced system of checks and balances, providing a quick fix for all regional problems is hardly possible. From this perspective, Latin American multiculturalism is a step toward involving indigenous groups and racial minorities in everyday politics. Without similar efforts, the post-Socialist societies will still long for communist equality in misery and promote compliant, conformable yes-men who support the post-communist dictators.
2. The constitutional drafting in both regions shows some deficiencies. Generally, the Latin American constitutions are

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in some states of the former Soviet Union, particularly the states of South Caucasus, the actual control of the president over the appointment of judges exposes the judges to political pressure and has a serious impact on their independence. See Rett R. Ludwikowski, *Constitutional Culture in East-Central European Democracies*, 29 GA. J. INT'L & COMP. L. 1, 27 (2000) (commenting on "politicization" of the constitutional courts and "judicialization of the constitution").

excessively long and detailed; they chaotically provide regulations and norms, which often overlap and are poorly organized. While the new post-Socialist constitutions are usually shorter and crisper, they endlessly refer readers to the implementing laws. In both regions, the drafters attempted to make their constitutions flexible, but missed finding a proper balance between normative and programmatic statements and between constitutional rules and statutory regulations. This results in a great deal of uncertainty as to the meaning of the law, gaps between theory and practice, and weak public identification with the constitutions. Although these observations might not be equally applicable to all of the constitutions, they still characterize constitution-making in both regions.

3. The language of the bills of rights varies and comparative analysis of constitutionalism in both regions shows that some constitutional drafters implemented a great deal of positivistic philosophy in their constitutions; others opted for more naturalistic concepts of rights. Generally, Latin American constitutionalism absorbed a lot of nineteenth century European positivistic philosophy, while the concept of granted rights gained an upper hand in socialist constitutionalism. However, with regard to the newly developed constitutions, there is no clear-cut distinction between positivistic and naturalistic acts. Several bills of rights in both regions refer to "inalienable and inviolable" rights in recognition of the fact that they are protected as features of human nature. In some instances, however, the philosophy of the drafters is vague and it is difficult to determine to what extent they deliberately followed more positivistic or naturalistic approaches, and to what degree they simply transplanted into the bills of rights the rhetoric with which they were familiar.
4. Studying the constitutionalization of human rights in multicultural and ethnically diversified societies confirms that collisions between individual and group rights are a *leitmotiv* of constitutional discussions. In Latin American and post-Soviet states, the disputes resulted in the polarization of those who presented merely liberal philosophy supporting the rights

of equal individuals and others who claimed that improvement in the protection of human rights hardly can be achieved without protection of group rights. The search for a proper balance between these positions should be a priority for the constitutional experts of both regions. Several remedies, such as regionalization of ethnic groups, power-sharing, proportional representation of minority interests, and affirmative action, have traditionally been tested in many regions of the world. The constitutional drafters in Latin American and post-Soviet states are familiar with these instruments, but their priorities in utilizing them are different. In the countries of former Soviet dominance, recognition of the limited autonomy of ethnic minorities has been most important. In spite of the relocation practices of the Soviet governments, historic ethnic minorities either survived or returned to their original territories. Their longing for at least cultural, if not political autonomy, is clearly expressed. Ethnic regionalism was, and still is, a policy which satisfies some of these aspirations.

The common problems with dictatorial regimes and defense against terrorism by paramilitary organizations resulted in a stronger trend toward internationalization of human rights movements in Latin America. The region showed a stronger tendency to constitutionalize affirmative action programs directed at protecting women's rights and transforming grassroots social actions into organized movements for human rights. Although regionalism in the post-Socialist countries (often chaotic, poorly organized, and reflecting some of the weaknesses of political culture in the region) did not resolve all the major problems of national minorities, it became a significant and instructive experiment in power-sharing. Regionalism, combined with grassroots efforts to create a civic society, may be a promising perspective for the post-Soviet region in the same way that multicultural constitutionalism combined with limited regionalism may effectively complement the process of internationalization of the human rights movements in Latin America.

5. Comparison of the bills of rights shows that the states of both regions differ significantly in implementation of international standards of protection of civil and political rights and fundamental freedoms. It is clear that the drafters familiarized themselves with basic international human rights documents but did not make an exhaustive comparative analysis of the constitutionalization of rights even in their own regions. The ability of the drafters to learn from the experience of others is still limited. The lack of a comparative approach often resulted in a chaotic selection of the rights covered by the constitutions and poor organization of the catalogues of rights. The new post-Soviet constitutions attempted to follow the Russian template. However, this tendency was not entirely consistent and sometimes the most important constitutional values were missing in the constitutional bills of rights, especially in the states of Central Asia and Caucasus.

Although the constitutionalization of rights in larger Latin American states, such as Argentina, Brazil, or Mexico, has been studied more carefully by the drafters of the constitutions in other countries of the region, no Latin American state has built a reputation as a model entity of the region. In sum, the constitutional drafters' studies must go beyond a mere examination of international documents. Well-balanced, cross-boundary comparisons would facilitate the logical standardization of human rights protection without unnecessary duplication of details failing to fit national needs.

Several specific observations on the most striking gaps in constitutional protection of social and political rights and freedoms should be brought to attention of the lawmakers in both regions:

- a. The delay in constitutionalizing some recognized standards of protection of rights frequently violates the international commitments of both regions. This is especially well evidenced with regard to capital punishment in the post-Soviet states and the right to privacy, which is still not adequately guaranteed by several older Latin American constitutions.

- b. In spite of the general tendency to expand the rights guaranteed to all persons, some countries offer constitutional protection of the most crucial rights exclusively to citizens, including the rights to dignity, life, personal liberty, property, and free movement.
  - c. The rationale for the decisions to constitutionalize or to skip the most seminal due process rights is often entirely unclear.
  - d. While there is nothing inherently controversial in constitutionalization of the concepts of social justice in the protection of property, states claiming market or market-oriented economies should clearly guarantee the protection of all forms of property. The incorporation of vague provisions, which might authorize so-called creeping expropriation or constructive taking, into the constitution undermines investors' confidence in protected market mechanisms.
  - e. One of the most potentially controversial aspects of the constitutionalism in both regions is the coverage of freedom of religion and expression. In several states free exercise of religion is subject to explicit and implicit limitations. Most constitutions still do not have specific provisions concerning the treatment of conscientious objectors and several do not address the relationships between the state and religious associations and between churches themselves. The scope of freedom of expression is unclear and freedom of the press and prohibition against censorship are often not explicitly guaranteed.
6. The disputes over the distinction between rights of the first and second category did not undermine the constitutional status of social and economic rights. Most commentators admit that there is a clear link between both categories; in order to enjoy political and civil rights and freedoms, people must be guaranteed decent living conditions. The controversy is not whether to protect social and economic rights but how to enforce the constitutional obligations. The level of protection given to social and economic rights is a matter of social choice concerning how to allocate resources needed to



guarantee the benefits of these rights. If the state cannot afford promising social and economic benefits, it has to be declared clearly. The discussions over the constitutionalization of economic and social rights in both regions should increase the drafters' awareness that constitutional language has to be precise and the policy of the state cannot be hidden behind vague constitutional statements. In other words, clarification of the distinction between rights which are judicially enforceable and those which impose only political obligations on the governments should be recognized as a priority of constitutionalism in both regions.

7. Judicial decisions began shaping the constitutional culture of the Latin American and post-Soviet countries equally with legislative actions, implementing decisions of the administration and the opinions of the media. Both regions tried to experiment with mixed models of judicial control. However, drafters of the post-socialist constitutions followed at least one pattern. Searching for the structural design of their constitutional courts at relatively the same period of time, they tried to adopt the German or French mixed systems, but showed reluctance to follow the U.S. decentralized model rooted in the concept of common law precedent. The Latin American states began their experiments with judicial review much earlier and were not given equal chance to review the mixed, but well-balanced and democratically organized, systems that gave individuals direct access to the constitutional courts. The post-socialist experience with judicial review has not been an overwhelming success more because of the lack of political safeguards than because of inherent problems with the adopted models. The Latin American judicial system fostered instability for both reasons. Both systems might be greatly improved by a mutual careful comparison of the experiences of judges, constitutional experts, and political analysts.

In conclusion, the above comments provide evidence that the process of transforming objective constitutional rules into safeguards serving individuals and protecting group rights is extensive and ongoing. However, constitutionalization alone, without the accompaniment of efficient enforce-

ment mechanisms and developed civil societies, is not a single panaceum for abuses of human rights. It is, however, a starting point and a *condition sine qua non* of the process of reform of the human rights protection system in both regions.

